United States Court of Appeals

for the Second Circuit

APPENDIX

74-1694

United States Court of Appeals
FOR THE SECOND CIRCUIT

TITAN GROUP, INC.,

Plaintiff-Appellant,

against

HAROLD FAGGEN,

Defendant-Appellee.

JOINT APPENDIX

Volume I, pages 1a to 70a; 1 to 583a

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DOCKET ENTRIES

FILED: MAY 8 '74

CIVIL DOCKET

UNITED STATES DISTRICT COURT

By Dft. 6/2/72

Jury demand date:

JUDGE TYLER

72 CIV. 1797

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
TITAN GROUP, INC.	For plaintiff: POWELS AND GROSS 110 EAST 59th STREET, N.Y. C? N.Y. 10022
AGAINST,	
HAROLD FAUCHE	For defendant: Shaib, Shacklin & Cooper 230 East 42nd St., NY 100 687 8800

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 3 mailed X	Clerk		5/8/72	Powels & G	11 —	
J.S. 6 mailed /	Marshal		5/8/72	U.S. Treas		15 —
Basis of Action: Sec. 16, Act. 1934 15:78p, 78ff	Docket fee		6/2/72	Powels & G	5 —	
	Witness fees		6/2/72	Clerk		5 —
Action arose at:	Depositions					

Docket Entries

TIXN GROUP, INC. VS. HAROLD FAGGEN

JUDGE [illegible] JUDGE [illegible]

72 CIV. 17

DATE	PROCEEDINGS	Date of Judgment
MAY2-72	FILED COMPLAINT. ISSUED SUMMONS.	
Jun 2.72	Filed Dft. Request for Production of documents.	
Jun 2.72	Filed Dft. Notice to take deposition.	
Jun 2.72	Filed Dft. Interrogs. to Pltff. First Set.	
Jun 2.72	Filed ANSWER. DFT. Demands Trial by jury.	SS&C
Jun 12.72	Filed Notice of Motion. Re: Summary Judgment ret. 6/20/72.	
Jun 12.72	Filed Memorandum in support of dft's motion for summary judgment.	
Jun.1-72	Filed summons with marshal's ret. Served Harold Faggen by Jennie Rodriguez on 5/11/72.	
Sep.12-72	Filed pltff's affidavits & notice of motion summary judgment ret., 9-26-72.	
Sep.12-72	Filed pltff's memorandum in support of his motion for summary judg.	
Oct.25-72	Filed pltff's reply memorandum in support of his motion for summary judgment.	
Oct.25-72	Filed reply affidavit of E.M. Kaufman .	
Nov.10-72	Filed pltff's notice to take deposition of deft. on 12-8-72	
Jan.12-73	Filed memo-endorsed on deft's motion filed 6-12-72 summary judgement: This motion for summary judgment is denied. After extensive oral argument, I have concluded that there are issues which must be decided at trial. I also have concluded that this case should be tried as soon as possible & this, in accordance with with the, memorandum of December 20, 1972 from Judge Levet to Chief Judge, Edelstein, I assign this case for trial to Judge Levet, So ordered. Ryan,J.	
Jan.12-73	Filed deft's reply memorandum.	
Jan.12-73	Filed reply affidavit of Richard K. MCIntyre .	
Jan.12-73	Filed memo-endorsed on pltff's motion for summary judgment filed , 9-12-72: Same endorsement as entered on deft's motion filed on 6-12-72 for summary judgment.	
Jan.12-73	Filed affidavit of E.M. Kaufman in support of pltff's motion for , summary judgment & in opposition to deft's motion for summary judg.	
Jan.12-73	Filed deft's notice for a trial by jury of the issues raised by deft's counterclaim & pltff's reply thereto.	
Jan.22-73	Filed pltff's replys to deft's counterclaims.	
Jan.29-73	Filed deft's affidavit & show cause order ret. before Ryan,J. on , 1-30-73 at 9:00 A.M. RM. 2203. RE: Promissory notes.	
Feb.5-73	Filed pltff's affidavit & notice of cross-Motion before Ryan,J. on 2-8-73 to amend complaint.	
Feb.8-73	Filed deft's notice of appeal to the USCA from the order entered on 1-12-73 denying deft's motion denying deft's motion for a mandatory , injunction. Mailed copy to Powers & Gross.	
Feb.8-73	Filed undertaking for costs on appeal in the sum of $250.00 by the, Fireman's Fund, National Surety Corp.	
Feb.20-73	Filed Reply Affidavit in support of motion to amend complaint, etc.	
Feb.21-73	Filed deft's notice to take deposition of pltff. previously noticed, dated 5-30-72 & adj. since dis will be taken on dates as indicated	
Feb.27-73	Filed notice that record on appeal has been certified & transmitted , to the U.S.C.A.	
Mar.5-73	Filed deft's affidavit & notice of motion ret. before Ryan,J. on, 3-15-73 permitting the deft. to serve supplemental answer & counter-claims.	
Jan.18-74	Memorandum reassigning case from Ryan,J. to Tyler,J(mn)	

Cont'd on page 2

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CIVIL DOCKET JUDGE Page 2

DATE	FILINGS--PROCEEDINGS	REF.
Mar 15.73	Filed Pltff's affidavit & notice of motion ret. before Ryan J. on 4/5/73 RE: Funds.	
Mar 16.73	Filed Deft's affidavit & notice of motion ret.before Ryan J. on 4/5/73 RE: Dismiss Complaint	SS&C
Apr 4.73	Filed Memo. End. on Motion dated 3/16/73. This motion has been withdrawn by Stip of the parties which has been approved by the court & filed	
Apr 4.73	Filed Memo. End. on motion dated 3/5/73. This motion has been granted on consent & a stip & Order so providing has bbn signed & filed by this court. So Ordered Ryan J.	
Mar 15.73	Filed Memo. End. on motion dated 3/15/73. This motion has been withdrawn by Stip of the parties which has been approved by the court & filed . So Ordered Ryan J.	
Apr 3.73	Filed Stip & Order that dft's motion to compel discovery & answers,etc. is withdrawn without prejudice.2) Pltff's motion to compel a turn over of funds from an Employees Retirement Plan is withdrawn. So Ordered Ryan J.	
Apr 12.73	Filed Supplemental Answer & Counterclaims by Dft.	
Apr 18.73	Filed Reply to supplemental Answer & counterclaim by pltff.	
Apr 17.73	Filed Order that all discovery is to be completed by 9/1/73. Ryan J.(M/N)	
Jun 22.73	Filed (in court) Reply Affidavit by Harold Faggen in support of dfts. motion for rehearing of motion of 11/20/72.	
Jun 22.73	Filed Memo. End. on pltffs. motion dated 5/5/73. Motion for leave to file an amended complaint is denied. Ryan J.	
Jun 22.73	Filed Memo. End. on dfts. motion dated 1/29/73. Dft's motion for a rehearing is denied. Ryan J.	
Jul 16,73	Filed notice-The Supplemental record on appeal has this date been certified and transmitted to the U.S.C.A.	
Aug.2-73	Filed Pltffs. Notice of Deposition of Michael Rosen on 8/15/73;Allen Aronsohn on 8/20/73;Benjamin Robinson on 8/24/73;Joseph Warren on 8/28/73.	
Aug-2-73	Filed Pltffs. Notice of Deposition of Rose Dogan Faggen on 8/31/73.	
Sep.11-73	Filed affdvt (pltff's) in opposition to motion to compel interrogs. & to compel depositions on an unreasonable schedule.	
Dec. 7-73	Filed stip & order withdrawing demand for trial by jury by deft.--Ryan,J.	
Dec.13.73	Filed True Copy of USC Mandate Ordered that the order of said District is affirmed. Judgment Entered 12/15/73. Clerk Dat. 1/10/74. (mailed notice)	
Apr 11/73	PRE-TRIAL CONFERENCE HELD BY Ryan.	

Docket Entries

72Civ.1797 TITAN GROUP, INC. VS. HAROLD FAGGEN

JUDGE TYLER

DATE	FILINGS—PROCEEDINGS	AMOUNT	RECEIPT #
Feb.19-74	Before Tyler,J. with Non-Jury.		
Feb.19-74	Trial begun.		
Feb.20-74	" contd		
Feb.21-74	"		
Feb.22-74	"		
Mar.5-74	"		
Mar.6-74			
Mar.7-74	"		
Mar.13-74	"		
Mar.14-74	" "		
Mar.19-74	and concluded.		
Mar.20-74	Filed Pltff's Excerpts from Deposition of Richard K.McIntosh to be relied on at trial by pltff.		
Mar.20-74	Filed Pltff's proposed findings of fact&conclusions of law on issues of liability.		
Mar.20-74	Filed Deft's proposed findings of Fact&		
Mar.26-74	Filed Pltff's Affdvt&Notice of Motion requesting hearing on issue of damages ret. at such time&place as Court may direct.		
Mar 29/74	Filed memo in opposition to pltff's motion for a hearing on the issue of the amount of damages recoverable by deft.		
Apr.2-74	Filed Pltff's Reply&Suppl.Affdvt in support of Motion for hearing on damages ret.4/12/74		
Apr.8-74	Filed Suppl.Memorandum in opposition to Pltff's Motion for a Hearing on Damages.		
Apr.23-74	Filed transcript of record of proceedings, dated Feb 19,20,21,22 1974		
4/23/74	Filed transcript of record of proceedings, dated Mar 5,6,7, 1974		
Apr.23,74	Filed MEMORANDUM OPINION#40625.It is determined that Harold Faggen is entitled to judgment on his counterclaim in the total amount of $6,378,535.68 which judgment will be entered without delay.Rule 54(b)FRCP.Question of legal fees for defense counsel under terms of the notes will be subject of a further hearing and separate judgment if latter is appropriate. TYLER,J.(mn)		
Apr.23-74	Filed JUDGMENT#74,380. Ordered that deft have judgment against Pltff dismissing complaint;ordered that deft have judgment against" on his counterclaim in/amount of $6,378,535.68 with costs to be taxed by clerk.TYLER,J.JUDGMENT ENTERED.Clk. (mn)		

(Contd page 4)

Docket Entries

Civ.1797 TITAN GROUP,INC. VS. HAROLD FAGGEN

JUDGE TYLER

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date C. Judgment
May 1,74	Filed Deft's Affdct&NoticeofMotion for supplemental judgment in amount of $250,000,representing reasonable attys' fees ret. 5/17/74.	
9-4-74	TRANSCRIPT OF RECORD OF PROCEEDINGS 9/13,14,19/74	
ay 8-74	Filed Pltff Titan Group,Inc.'s Notice of Appeal from each & every portion of Judgment entered on 4/22/74 in favor of deft.& against Pltff & further appeals from any Amended Judgment or Supplemental Judgment entered subsequent to date of said Judgment of 4/22/74 from Findings of Fact&Conclusions of Law directing judgment be entered in favor of deft dismissing complaint & judgment for deft on his counterclaim&from Supplemental Memorandum of 4/22/74 filed by Court together with certain Findings of Fact&Conclusions of Law entered on record in support of.(Mailed copy to Smith Shatzkin&Cooper on 5/9/74)	

proposed findings and conclusions with citations therein and I believe it is to the interest of everybody involved, counsel, litigants and perhaps even the Court if this case is resolved at the trial level.

There will follow what shall be deemed my findings of fact and conclusions of law pursuant to Rule 52 FR Civil P.

Under contracts closed on December 2, 1968, the plaintiff Titan acquired from the defendant four companies known as Harold Faggen Associates, Inc., Actuarial Tabulating Corporation, Employee Fund Services Corporation and Fund S & E Corporation. Specifically, of course, Titan acquired the capital stock of these four companies from defendant Harold Faggen in consideration for the issuance to him by Titan of $5.5 million worth of convertible debentures bearing interest at four percent per annum.

Although the convertibility details varied slightly, suffice it to say, the debentures would be convertible by Faggen at an average price of $19 a share.

In the fall of 1968 as I understand the evidence, the common stock of Titan was trading at roughly from 15 to 17-1/2 points.

In May 1972 after a prolonged period of bicker-

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ing between the parties, Titan notified Paggen it would no longer pay interest then due and owing on the debentures. At about the same time, it commenced this suit in this court seeking recision of the contracts and money damages.

Based upon claims of violations of the Securities Exchange Act of 1934, 15 U.S.C. Section 78J(b) and Rule 10b-5 thereunder 17 CFR 240.10B-5.

Defendant reciting the default on the notes has counterclaimed to recover the full value of the debentures plus outstanding interest.

I propose to treat first the negotiations and other events prior to and leading up to the closing on December 2, 1968.

Titan is a comparatively small conglomerate which in 1968 was basically in the mortgage, real estate and construction business. With the boom market of that year, Titan was very interested in acquisitions of other companies. Then as now, it was in an exceedingly tight cash position. Moreover, at that time and over the years to date, Titan has sustained several changes in equity control and even more changes in top management.

Early in 1968, Titan had come under the dominance of what is known and as was referred to in this trial as the Block group. That group installed Anthony

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Frank as president of Titan in the spring of that year. Benjamin Robinson then as now a New York lawyer although not literally a member of the Block group was and continued to be chairman of the board of Titan. A long standing associate and business acquaintance of his was the defendant Harold Faggen. Harold Faggen is a law graduate, albeit, as far as I can determine, he has never been a practicing lawyer. He is also a certified public accountant and actuary and his field of expertise, basically, has been in the accountancy profession.

In 1968 he was the successful owner and executive head of an actuarial data processing business. The core of his business success then was the acquisition and retention of many clients, particularly unions in union pension funds and insurance business.

Essentially at that time the bulk of his business was done under the name and style of Harold Faggen Associates, Inc. As indicated heretofore, however, Faggen also did business through three other corporations, the stock of which he owned and those corporations I named earlier.

As stated, he and Ben Robinson had close business and professional contact. Indeed, several of the unions and pension funds represented by Faggen as an

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actuary happened also to be represented by Robinson or his firm as counsel.

When Frank and the Block group came into the picture in early 1968, Frank who had been a California real estate operator and his board of directors were interested in acquisitions. This is not surprising because if you will recall and certainly this Court takes judicial notice of the fact that 1968 was one of the peak years of conglomerate activity and acquisition activity and there was a relatively boom market in that year.

A friend and associate of Frank at the time was Edmund Kaufman, a Los Angeles lawyer and member of the law firm of Irell & Manella. Kaufman purported to be and in fact I deduced was a specialist in mergers and acquisitions.

In 1968, the Faggen companies had enjoyed a very strong cash and liquid asset position. In particular, their actuarial business, albeit relatively small perhaps from certain points of view was nevertheless very successful.

Not surprisingly,therefore, Harold Faggen had received a number of overtures for the acquisition of his business or a merger from such substantial firms as

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Price, Waterhouse and more particularly, Levin Townsend and Diebold Corporation. Thus, in the second quarter of 1968 with the assistance of a man named Rogoff who prepared projections of income for the Faggen companies which among other things recognized distinctions between accounting for private firms and for public firms, Faggen made presentations to these companies just mentioned.

In the course of these discussions, particularly with Levin Townsend and Diebold, it appeared that these firms had suggested, albeit not firmly offered figures from five million to seven million to acquire the Faggen companies. Faggen discussed these conversations and tentative negotiations with his friend Ben Robinson, who lost little time in putting Faggen in touch with Anthony Frank. Both Robinson and Frank made it realistically clear to Faggen that Titan would be interested to acquire his companies. As a result, Frank had Kaufman come to New York from Los Angeles and take up discussions with Harold Faggen. Their first meeting of substance came on September 6, 1968 in the Robinson law offices on Park Avenue, New York City.

As far as I can tell, no specific price was

discussed or certainly was not negotiated that day between Kaufman and Faggen, but it does appear that Kaufman looked over what is in evidence as Exhibit 1 in whole or in part, a set of projections prepared in large measure by Rogoff and Faggen.

More than that, Kaufman looked over the tax returns of the Faggen companies for the past three or four years. They discussed in general the actuarial business and the prospects for the Faggen companies, at least in theory, in the field of data processing.

A much more significant and detailed meeting occurred thereafter on October 2, 1968, also in New York. Frank was apparently present at this meeting for a relatively brief time but Faggen and Kaufman were the principal participants. Faggen and Kaufman went over the Faggen company tax returns once again. They also appeared to have discussed the balance sheets at least to the extent of the cash position or net worth of the Faggen companies.

There then followed another meeting on October 6 and this one was principally concerned with conversation between Frank and Faggen;and at the request of Frank, Faggen delivered to him, Frank, a handwritten memorandum of a brief narative and statistical summary

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of accounts of the Faggen group and their employees at least in terms of numbers.

There was also apparently a pro forma which was prepared by Faggen or someone in his organization which was part of that exhibit, which we know as Plaintiff's 2. Frank thereupon proceeded to have that particular document typed up and that is in evidence as we know it as Plaintiff's 3.

Going back to October 2, it appears that at the conclusion of that meeting, both Faggen and Kaufman shook hands on a tentative deal which would be subject to board approal and the workingout of specific details by financial and legal representatives, particularly of Titan.

Now, it would also appear, although it is not entirely clear because of certain equivocal testimony both by Mr. Kaufman and in my judgment Mr. Faggen, that it was at the October 2 meeting that Kaufman took the income for 1968 and estimating the present tax income from those figures to be about $550,000, negotiated Faggen down from a price originally suggested by Ben Robinson of about $7 millon when he first talked

to Frank and Faggen about this matter. As Kaufman put it, therefore, he negotiated Faggen down to a price of $5.5 million in convertible debentures. Though much has been made of this figure and how Kaufman relied upon it, I think his principal reliance was to get Faggen down to that amount even though he may have used the figures as plaintiff argues, and it was a technique perfectly acceptable among professionals in order to get a rough approximation which in turn would lead to a good price.

Although Kaufman may have been understood to claim otherwise in his testimony at this trial, it is specifically found that he did not rely really in any way on the so-called projections of earnings which we know as Plaintiff's 1, nor did he rely really on what is called the pro forma attached to Plaintiff's 3. First of all, he didn't have that pro forma Plaintiff's 3 because that didn't appear until the October 6 meeting.

Second of all, even assuming he was reading the same figure, for example, of 1968, which does appear on Plaintiff's Exhibit No. 1, the so-called Faggen-Rogoff projections, I don't think that Kaufman relied on those at all in coming to a handshake tentative agreement with Harold Faggen. The reason for this are many, but I can

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summarize briefly at this moment to say that Kaufman understood full well that this was a deal which was attractive because it was an acquisition and it looked as though the actuarial business might be put together very neatly with some of the mortgage and real estate business which Titan was already into, and that possibly there was a chance for some data processing melding which in the future would be potentially exciting and profitable. More than that, I think Kaufman was bemused as many other persons were bemused by the strong asset and cash liquid asset position of the companies of Harold Faggen.

Now, as stated on October 6, Faggen, as he put it, got very excited about the figures, most particularly in respect to the net worth of the Faggen companies. Also as Frank put it, he was excited about the possibilities that might be made or put into effect once the Faggen group was merged into Titan to build upon the computer capacity such as it was of the Faggen companies.

Frank was also aware, as was Kaufman, that Ben Robinson, chairman of the board wanted this deal and therefore he wanted to do the best he could to see to it that this deal was sold to the board of directors.

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I believe that largely for this reason, he asked Faggen to prepare a presentation and give it to him the following day and as indicated, this was done and as a result, Plaintiff's 3 came into being.

Two days after October 7 and on October 9 was held the board of directors meeting which, inter alia, took up the question of the Faggen group opposition.

According to plaintiff in this lawsuit, the board members relied heavily on the pro forma of earnings which were typed up and incorporated in Plaintiff's 3 in evidence but this claim is substantially undercut by a number of other matters of evidence in this case. To begin with, although the plaintiff argues otherwise, the minutes of that board meeting by no means indicate that this was so. Beyond that, the plaintiff called a number of director witnesses, that is, witnesses who had been directors in the fall of '68 at the time when Titan made this acquisition. Only one of these witnesses, Frager, recalled any discussion of earnings at all at this meeting and he wasn't particularly explicit on just exactly what was said and even if I am wrong on that, it is abundantly clear from any fair reading of Frager's testimony, that this wasn't as important as such other facts as the fact that Chairman Robinson

rkjw 15 1150

wanted this deal and that Titan was in a cash position of a very tight nature and here was an acquisition which would pick up between 2 and $2.3 million cash.

Now, it is true, however, that at that board meeting, Frank had with him Plaintiff's Exhibit 3. It is also true that he did not physically distribute this to the board members. The only evidence that any board member ever saw this document within its four corners is the testimony of Witness Hegy, a member of the board who was not present at the October 9 meeting. He was away, he came back after the board voted on this acquisition and Frank did present to him for his consideration and reading the exhibit which we know as Plaintiff's 3.

Obviously this had nothing to do with the decision of Titan to acquire the companies because Hegy only read it after the fact.

Suffice it to say that the board of directors on October 9 voted to acquire the Faggen companies subject to investigation and approval of the financial and other details by the executive committee of Titan and by the Robinson firm in respect to legal matters.

Of considerable interest and importance is

rkjw 16 1151

the fact that between October 9, the date of the board of directors meeting and the date of the closing December 2, 1968, two financial and accounting employees of Titan Messrs. McIntyre and Russo, checked into the financial data and records of the Faggen companies. Although it could be argued that each of these gentlemen, particularly Russo, have taken a markedly different position in connection with their testimony in this trial, or prior to trial in depositions, it is certainly beyond any serious dispute that at the time, that is, at the time between October 9 and December 2, the closing date, they raised no quarrel or difference of opinion with the figures submitted by Faggen or any of the books and records which they had a chance to look at.

While all this was going on, the Robinson firm representing Titan and Mr. Simon Sheib of the firm of attorneys representing Faggen in this very lawsuit negotiated the contract as a formal matter after Kaufman out in his office in Los Angeles, apparently, had prepared a first and rather rough draft. This draft was mailed by Kaufman back here to New York to a Mr. Rosen, I think, in the Robinson law firm. In the course of the lawyer's work, it was agreed Titan would buy the Faggen companies against the tax returns for the

rkjw 17 1152

last five fiscal years of those companies and also against the unaudited financial statements of the companies prepared by Joseph Warren Company, a certified public accountancy firm, for the quarter ending September 30, 1968.

I should say parenthetically, but importantly, as it is, the plaintiff has not even attempted to offer or if they have, offered any persuasive evidence that those particular contract document financial statements as set forth in paragraph 3 of the contracts of acquisition contain anything of significance or materiality which was false or misleading at the time they were made.

After the changes in the contracts were made and the negotiations between Mr. Sheib for Harold Faggen and the Robinson firm for the corporation and after Russo and McIntyre had made such inquiries and studies as they made, it appeared that the executive committee of the corporation must have approved this, although the record is notably thin, if not indeed virtually silent, on just what the executive committee did do as a formal matter for Titan, once the board meeting of October 9 had been completed.

The closing took place in any event without any difficulty on December 2, 1968.

Almost literally within a week or two after the closing, I should note that a employee of some ten years of the Faggen group, a man whose job was called a consultant, and he was one of five or six consultants to the Faggen group, by the name of Tabor quit his employment and took with him some of the clientele of the Faggen group. Harold Faggen brought this to the attention of other management of Titan and not long thereafter, a suit was commenced by Titan against Tabor and his new employer which was none other than the Levin Townsend firm, by the way, and with not too long a delay, that litigation was settled rather profitably it seems to me whereby the defendants paid approximately 260 or $265,000 to Titan.

As 1969 arrived, events seemed to move along at first smoothly enough but then later that year, as the stock market started downwards, the problems of Titan and all of its activities appeared to become more apparent and binding.

As far as the record shows, the actuarial business of the Faggen group as it was literally called by the Titan executives, continued to do a strong business. Kaufman by this time had become chairman of the board since he was part of the so-called Block group.

rkjw 19 1154

It is true that there is evidence that Kaufman in 1969 became somewhat dissatisfied with the data processing efforts of the Faggen group. In a sense you could argue that this is curious because Kaufman himself as I understand the proof had been told by Faggen in September or at the very latest on October 2, that there would be a flat year for the Faggen group in the data processing end because of the start-up costs and new hardware expenses among other things.

I think the same warning incidentally had been conveyed by Faggen in the presense of Anthony Frank. In any event, Kaufman seems to have been a little unhappy as he was unhappy about a down-turn of business in virtually all of the divisions of the Titan group.

In the meantime, also, as 1969 went along, Kaufman himself began to engage or, I should say, encounter heavy weather in arguments in the Titan group family. Indeed, he finally left Titan as chairman of the board in the spring of 1970 and he did not leave in what I would call an aura of good feeling. He was then succeeded by none other than the aforementioned Mr. Frager of St. Louis as chairman of the board and then there was a gentleman for a period of a month or two by the name of Rosen,

Harry Rosen and finally and unhappily as event turned out from the Harold Faggen selfish point of view, Mr. Robert James Frankel became chairman of the board. Frankel had first come into contact with Titan through a friend of his who was a member of the Robinson law firm. This was in the spring of 1969. Frankel was successful in negotiating the sale to Titan of a construction company of his known as Soverign Construction Company. He was elected as a director of Titan in 1970 at the annual meeting of the stockholders and not long thereafter, in February of 1971, Mr. Frankel became chairman and chief executive officer of the Titan group. Not surprisingly, since he assumed the latter office, he came smack up against one of the usual bugaboos of the Titan group, lack of cash. At about the same time he met Harold Faggen and in all places, the Yale Club, and immediately he tried to get Faggen and his so-called Faggen group to cast up more cash for the parent company. At least in human terms, it is not surprising to learn that Faggen reminded or pointed out to Frankel, that Titan had acquired at least $2 million worth of cash in marketable securities when the Titan group had acquired the Faggen companies and that therefore he was not at all enthusiastic in weakening the Titan group

rkjw 21 1156

operations by contributing more cash.

Partly because of Faggen's adamance in this position, Frankel in April 1971 sought to prevent Faggen from being re-elected to the board of directors. This I am sure did not endear Frankel to Faggen and I surmise there were some personal differences between the men which are, from what I infer from the evidence and see from their demeanor in the courtroom, probably understandable on both sides. Even more important, perhaps, Frankel ran up against another difficult problem and that was how to pay the interest at 4% which was falling due from the Titan group to Harold Faggen on his convertible debentures.

In May 1971, therefore, Frankel sought, as he testified, to have Faggen see to it that the Faggen group took out of their coffers cash to pay Faggen personally on his notes. Faggen was notably unenthusiastic about this, according to Mr. Frankel and I assume this is correct and as a matter of fact, in the summer of 1971, there were special board meetings and other conversations of an informal nature devoted to the problem as Frankel saw it of the interest due to Faggen on his notes.

Relationships were not advanced by the initial

fact that it was during this period that Frankel asked Faggen to cut back on his data processing business and not acquire new clients for that kind of business unless those new clients were willing to underwrite their own start-up costs.

Thus by the fall of 1971 at the very latest, relations between Frankel and Faggen, to put it kindly, were strained. Indeed, Frankel was already casting around for information and legal assistance so that he could make claims against Faggen and Benjamin Robinson.

In December 1971, Harold Faggen's employment contract which was executed as part of the acquisition of the Faggen companies expired by its terms and Frankel with admitted reluctance extended Faggen on a month-to-month basis only. To make matters even worse, nature intervened in the form of exposing Faggen to a rather serious illness which required him to be operated upon and thus away from the business for a significant period of time in the winter of '71, '72.

The handwriting it seems to me was then on the wall and in April 1972, Faggen found himself no longer a member of the board of directors of Titan and as heretofore indicated in May of 1972, the Titan group commenced this suit after they had notified Faggen that

they were no longer going to pay any interest on his notes.

Now, briefly summarized, plaintiff's principal contention in this federal court litigation is that Harold Faggen made knowingly false material statements concerning the financial and business facts of his four companies upon which Titan relied prior to the execution of the contracts on December 2, 1968 in acquiring the capital stock of these Faggen companies in exchange for $5.5 million worth of convertible debentures issued to Faggen.

Put differently, in lawyers' terminology of a simple kind, plaintiff claims there was fraud in the inducement and that this was not only a violation of Rule 10b-5, but it was also common law fraud of the most gregious nature.

Specifically, Titan contends that the income figures set forth on the pro forma attached to Plaintiff's 3 in evidence were knowingly false in a materially significant way. According to Titan group, its accounting experts who have testified at trial and who prepared various financial documents and computations relating to the condition of the Faggen companies in the year 1965 to and including 1968, which computations were

made of course after the commencement of this lawsuit, have proved that the figures submitted by Faggen in what we call Plaintiff's Exhibit 3 to be materially false and intentionally so to the knowledge of Faggen.

In addition, Titan makes a number of other contentions, some of which this Court regards as bordering on the absurd as follows:

Faggen was and is guilty of a conflict of interest in that he did not advise the Titan negotiators and representatives that Ben Robinson had represented him or his companies as a lawyer and that there had been a long relationship whereby they both represented the same unions or the same union pension funds.

Additionally, it is claimed that Faggen falsely stated that he and his companies had in being, a model for a computer program for the pensions of small accounting firms, small law firms and the like.

Additionally it is alleged that Faggen falsely covered up the fact he had lost substantial clients in 1968 and there was a clear danger of losing other major clients in the foreseeable future.

On the other side of the coin, the defendant has contended that there is no truth in these allegations as a matter of fact. Beyond that, the defendant has

rkjw 25 1160

claimed that this suit is time barred. Defendant has also claimed that plaintiff has no right to prove anything that went on before the contracts were signed because of the parol evidence rule or because as it is sometimes put, that whatever negotiations took place between Faggen on the one hand and Kaufman and Ben Robinson perhaps, and certainly Anthony Frank, merged into the formal contract documents.

Now, although as will be seen hereinafter I have considerable difficulty in finding that plaintiff has proved by a preponderance of the evidence that Faggen made knowingly false material statements or purposely withheld material information which was necessary to make the picture complete in his negotiations with Titan group, this Court concludes that Titan by its officers and directors did not rely substantially upon any of the information which plaintiff now claims that it did, but before we get to these ultimate conclusions of fact and conclusions of law, I want to take up two points which were argued eloquently in the course of the argument.

First of all, as you gentlemen know, the Court specifically raised the question of jurisdiction. Suffice it to say basically that I agree with the

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plaintiff. I believe the plaintiff has proof sufficient to show jurisdiction. In more detail, as we know, the Courts have interpreted very loosely the requirement of the statute on Rule 10b-5 that an instrumentality of interstate commerce or the mails be used directly or indirectly and as good a case as any in this court recently is a case called Heyman versus Heyman at 356 F. Supp. 958, decision by Judge Bauman.

Here as Mr. Powers accurately pointed out, I believe there is ample evidence of use of mails and of interstate phone calls between Kaufman and Frank perhaps on the one hand and Faggen on the other. More than that, certainly I think every inference should be to the effect that Faggen well knew that there would be use of the mails between Los Angeles and New York and that there would be use of the phone in arranging the particulars of this transaction. Therefore, I think the plaintiff is clearly correct and that this Court has jurisdiction under the statute on Rule 10B-5 in that sense.

The other point I would like to take up now is the very interesting and much more difficult argument of the defense based upon the statute of limitations and perhaps laches as well.

gkjw 27 1162

I can well understand the position of the defendant on this score because there is ample evidence from which one might infer that the plaintiff Titan group wasn't misled or lulled at all. As a matter of fact, if one looks at the records, let alone the testimony, as late as March of 1970, Titan group was representing to the world through its annual reports and materials filed with the Commission, I assume, but at least in its annual report, that this was an arm's length deal which Titan group had investigated carefully before they made these contracts with Harold Faggen. Moreover, we have the evidence already discussed that McIntyre and Russo looked into this and never thought that anything was wrong and never told anybody that anything was wrong.

Still further, as defense counsel argued this morning, if all of these things were as terrible as has been argued here, you would have thought that the defection of Tabor within a matter of days after the contracts were signed, if there was really any lulling, might have made the management sit up and take note.

On the other hand, from all of that, I still end up siding with the plaintiff. I think there is

rkjw 28

suffient here to show that a federal court, of course, in the first instance must look to New York law since the statute does not have any limitation period. Once it does that, it doesn't willy-nilly end up with the contract provisions saying that March 31, 1970 is the absolute cut-off for any claim or suit in connection with this acquisition.

I think I should give the plaintiff the benefit of the doubt for such reasons as, presumably, as plaintiff argues, it really wasn't until Frankel came in that the management possibly was sufficiently independent from the power of Ben Robinson and Harold Paggen to really look into this.

I also think a federal court would as a policy matter, be unwilling to give literal effect to that application of the contract provision in question even though that is supported by a provision of New York Statutory Law, but I think the federal policy considerations would be more weighty, that a federal court ought to decide the merits rather than taking the technical position under these circumstances that a plaintiff is forever cut off absolutely as of March 31, 1970.

In any event, I side with the plaintiff on this issue and think that it is appropriate to turn to

rk 1163a

merits, but I will say that it is a very interesting and closer question than perhaps I at least initially thought it was when I first heard it from Mr. Cooper when this case was first assigned to me.

I might point out in order to determine when the statute of limitations begins to run, the Courts have held that Federal law must be applied, and that is one of the good legal reasons why I think the argument of the plaintiff in this respect probably ought to carry the day.

In other words, the first exercise is to look to the appropriate precise limitation period and there we look to the law of New York.

The next step, of course, as just stated, is to determine when that statute of limitation period begins to run and there I think the case agree that Federal law should be applied.

Given the liberal Federal policies in this area, I think the better view is to favor the plaintiff and say that this case is not time barred by the statute of limitations. That is not to say, however, that some of the laches arguments or the argument by the defense that this is nothing but a contrived lawsuit should be totally ignored when this Court turns to the merits.

rkjw 30 1164

There are a variety of reasons why I think reliance or lack thereof is the key to this case. As we have all agreed in the course of colloquy and argument; this is not a case brought by a shareholder of a public company who had no benefit of face-to-face dealings with the contract or the contracts in question. As was pointed out in Chris Craft Industries vs. Piper Aircraft, Second Circuit 480 F2d 341, 371, Cert. Denied 414 U.S. 910 (1973), where the transaction is accomplished through impersonal dealings such as on a stock exchange or for some other reasons the factors that influence the parties are not readily apparent, the decisions have discussed liability in terms of the materiality of the misrepresentations. This is sometimes referred to as the objective standard and has also been used in class or injunctive actions, but in individual damage actions as I read the cases, proof of reliance, is still required. As good a case as any on this is List versus Fashion Park, 340 F. 2d 457, 462 Cert. denied 382 U.S. 811, (1965). There it was held that the individual plaintiff must show both that he relied on past misrepresentations and that a reasonable investor would have relied.

The fact that the plaintiff was an experienced

rkjw 31 1165

and successful investor was taken into account in Lisk.

A similar case is the Third Circuit decision Kohn versus American Metal Climax, 458 F. 2d 255, 290.

In any case, whatever the circumstances and facts may have been in all the case law that we know of and certainly in the two cases I cited, if here there was a case where reliance ought to have to be proved by a preponderance of evidence, it is here. We had sophisticated parties. Indeed the balance of sophistication and no how rested heavily in favor of the plaintiff, Titan group. This was a face-to-face deal and even Titan group as late as early 1970 was telling everybody in the world who would read their annual reports that this was so. It was out on a prospectus in that year and that prospectus, of course, was distributed to the public after approval, presumably by the Securities and Exchange Commission.

I am totally unpersuaded or I certainly am not persuaded by a preponderance of the evidence that there was any such great reliance as Titan group now argues on the pro forma attached to Plaintiff's Exhibit 3. I believe the real reliance was in quite different areas, such as number and most importantly,

the fact that the Paggen group seemed to have a good going business which nobody even to this day denies was the fact and that it had a very strong net worth.

Two, I think the major reliance was on the good word of chairman of the board Ben Robinson who at least at that time was a highly respected and potent force on the Titan board.

Three, I think that none of us can ignore the clear intent of particularly the Block group as represented on the board and I dare say every other member of the board to not only get Titan in a better cash position, but to make acquisitions and grow, grow, grow. 1968 was a big conglomerate year, generally, and the Titan board of directors was no exception to what was going on at that particular time.

Four, I think there is some truth in what the plaintiffs argue but I don't draw the adverse conclusions that plaintiff does. I think there was considerable interest as Anthony Frank said in trying to put together the actuarial business with the mortgage and real estate business of the Titan group already existing and more than that, to build a data processing operation which would meld both the actuarial, accountancy and mortgage and real estate details in the same operation,

rkjw 33 1167

but I don't think Frank for one minute assumed or was told by Harold Faggen that that capacity already existed in the Faggen groups. I don't think for one minute Anthony Frank failed to understand that the computer hardware and existing programming in the Faggen companies was comparatively small and unsophisticated and that is that.

I don't think that the Titan group had the slightest interest, really, in the details of the numbers of clients and whether they were inter-related clients in the sense that the unions quite obviously had something to say of who or what firm would be accountants for the union pension funds. I don't think that anybody cared the slightest about that. Everybody was relying on the know-how of Ben Robinson, who after all had considerable union business which he brought into his law firm, and Harold Faggen seems to have similar and maybe even better business from an accountance point of view and that is all anybody cared. Whether it was 140 clients or 70 clients and whether Harold Faggen had lost ten percent of his clients the year before or was about to lost 20 percent of his clients, they couldn't care less and nobody kidded anybody on that score.

As far as conflict of interest is concerned, although I

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really believe the plaintiff has effectively abandoned that argument, that is a reductio ad absurdum.

No one was bemused about the close relationship between Robinson and Harold Faggen. That is part of the reason the deal was sold and that is part of the reliance.

Second of all, there is nothing wrong in the law or in the canons , if there are any canons available, and they certainly weren't made available to the Court at the trial,in the accountancy industry, but I will take due note of the fact that it is unlikely there are any canons which would say that it is wrong for an accountant to deal with a lawyer and in effect, each of them bring business one to the other.

Second of all, even if I assume that this ridiculous argument is factually correct as advanced by the plaintiff, I can only say that in 1968, if all those facts had been known to the Board, it may have even whetted their appetite more than it was already whetted for these particular acquisitions.

As I think Mr. Powers finally came down to it today, everything except the figures is totally unpersuasive, even to the plaintiff's knowledge. Sadly enough, I can understand this. There is no doubt that

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Mr. Frankel found Faggen a difficult man to deal with. I don't blame Frankel for that. I can surmise that Faggen is a little bit feisty and difficult and was probably a prickly rose to put it kindly, once he and Frankel started to walt over the interest due and the data processing business as Frankel saw it, as opposed to how Faggen saw it, but I am afraid that all of that has permeated this lawsuit. Both sides have been assiduous in covering each other with mud and like everybody else,we are dealing with human beings and there is a lot of mud around for both sides, particularly post-acquisition, but that doesn't help the proof of the plaintiffs case except in respect to perhaps the figures.

I have already held that the figures, really, are meaningless, at least to the extent that they were relied upon as plaintiff argues. However, I think in fairness, these figures out to be discussed and analyzed a bit.

It has been stated that Plaintiff's 1 contained and in fact it does, contain the 1968 income pre-tax for the Faggen companies to be about $571 000. That is true. Those schedules which Rogoff and Faggen prepared do show that.

I accept the argument of the defense, however,

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that Kaufman really didn't rely on this at all. Kaufman also understood, because he saw the tax returns, that there had to be significant adjustments made because on the one hand the Faggen groups were wholly-owned or private companies and therefore their accountancy and tax reporting methods necessarily were different than those of a public company such as Titan.

More than that, despite whatever he may have inferred at trial, certainly Kaufman knew that these figures probably embraced income earned from investments of about $1 million or slightly more in the portfolio of marketable securities held in the name of these Faggen companies rather than by Faggen individually.

We have heard a great many arguments and the witnesses have all been asked under direct and cross the significance of the handwriting that appeared on certain copies of Plaintiff's Exhibit 3, that is, more particularly on the page which we know is the pro forma page and what is meant by "excludes investment income."

The plaintiff argues strenuously that this phrase written in the handwriting at one point of Mr. Ben Robinson and at another point by Mr. Frank indicates beyond peradventure that Faggen told these gentlemen that the pro forma figures excluded earned income from

rkjw 37 1174

securites.

I am sorry to find flatly that there is no persuasive proof to that effect whatsoever. Admittedly, the picture is not entirely clear, but the plaintiff has the burden of proof here as it does across the board on its claims and I am more inclined to think that in the case of Robinson, although his testimony was a bit fudgy and cloudy on the point, that he really wrote that phrase down because he wasn't sure what these figures included, and as to Frank, I think he did the same thing. He wanted to find out and make sure and I am by no means convinced by a preponderance of the evidence that Harold Faggen told them orally otherwise.

As a matter of fact, if you look at the tax returns and you look at the other figures, it is virtually impossible for this Court to assume that the plaintiff could possibly be right on this argument because I cannot see how you could get $571,000 on any other basis except including investment income for the year 1968. Particularly so-called adjustments having to do with the over funded pension account, T & E, salaries of Harold Faggen and Rose Dogan

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which Titan group understandably submitted ought to be reduced and the like.

Though the picture is not as clear as a selfish matter you would like to see it as a finder of facts, I am certainly not persuaded that the plaintiff's version of all of this is in fact correct.

Thus, the reconstructed figures of the accountants who worked on this matter and who testified for plaintiff at this trial are suspect because they made certain assumptions in this area which I do not find supported clearly in the evidence. Not only that, although Mr. Powers is correct, I believe in suggesting that when Frank and Kaufman and Faggen were talking prior to October 9, 1968, they both were moxing up both accrual methods of accounting and cash methods almost necessarily. There is nothing wrong with that. It doesn't follow from that that the accountants who did the post-litigation commencement work here were following the same methods which the Faggen company books were kept on at the time of the negotiations in the fall of '68.

Not only that, as indicated, I think they made certain assumptions about the adjustments and certain assumptions about income from investments which are not clearly supported.

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Finally, I can only note that this puts us in a position where we are comparing apples with oranges, which is not very persuasive evidence in my judgment in an important matter or question as to whether or not there was a material misrepresentation of the financial data shown on the pro forma.

I would be less than fair to plaintiff if I didn't admit there is a possibility that upon reconstruction using slightly different accounting methods, one could establish from an accountancy point of view that the figures advanced by Faggen in the fall of 1968 didn't prove out to the dollar. That I think is probably true, but I think any shrinkage from the $571,000 was far less that what plaintiff here claims which is the difference between some $404,000 and $571,000.

All of this is really of esoteric interest as it is because I cannot be at all persuaded that this is what was really relied upon by sophisticated bookkeepers like Russo and McIntyre -- McIntyre put it very well in saying in effect that; "our real concern and only concern was to look at enough to make sure that these pro forma figures were within the ballpark." Plaintiff has not satisfied me by a preponderance of the evidence that the figures

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were anything but in the ballpark and no one has shown me or no one has even attempted to show this Court that anybody tried to bamboozle Russo and McIntyre. I own to the fact that some of Harold Faggen's ideas of tax return preparation and reporting of individual income taxes do not accord with my notions as to how these things should be done. For example, I am not entirely sure that the T & E deductions that his records show or his companies' records show were entirely supportable from a private firm point of view, but again, this is all really meaningless because I don't think anybody in Titan group could have cared less about all of this detail in the fall of 1968.

Now, there is one other point I want to make and that is this. Mr. Powers, and the plaintiff have argued consistently if you look at page 2 of Plaintiff's 3, or the corresponding page on Mr. Faggen's handwritten version thereof, a real fraud appeared in the following language and I quote from paragraph 2 page 2, dropping the first clause of the sentence, "We are in the process of programming completely automated pension plan calculations for small and medium sized employers. We expect to provide these services to stock brokers, accountants and lawyers only."

I will assume at least arguendo that he was at least guilty of a little modest puffing but on the other hand, even accepting that construction of this language, I read it to indicate the fact, namely, that they didn't really have any completely automated program for pension plan calculations for small and medium sized employers, and as already indicated, I find specifically that Frank put this construction on this language and on any oral conversation he got from Harold Faggen. As Faggen understood and I don't blame him, I think I would have reacted the same way, this offered exciting possibilities, but that is all it offered. A further point on this; it wouldn't have made much sense for Harold Faggen to say as he did and Frank I think conceded this, that look, 1969 will be a flat year in the data processing end because we will have all these start-up expenditures and new hardware expenditures, and, therefore, I am afraid this is one of the gossamer arguments of the Titan group in this lawsuit.

On the basis of these findings and conclusions, I determine that there is no proof by the plaintiff by a preponderance of the evidence that the defendant Faggen was guilty of any scheme or artifice to defraud or that he made any untrue misstatement of a material

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fact or he omitted to state a material fact necessary in order to make the statements in fact made in the light of the circumstances under which they were made not misleading.

Therefore, the defendant is entitled to judgment dismissing the claims of the plaintiff and as our argument this morning indicated, there is no other defense to the notes. Therefore, the counterclaim which Harold Faggen asserts is granted and he is entitled to judgment on his counterclaim.

ing between the parties, Titan notified Faggen it would no longer pay interest then due and owing on the debentures. At about the same time, it commenced this suit in this court seeking recision of the contracts and money damages.

Based upon claims of violations of the Securities Exchange Act of 1934, 15 U.S.C. Section 78J(b) and Rule 10b-5 thereunder 17 CFR 240.10B-5.

Defendant reciting the default on the notes has counterclaimed to recover the full value of the debentures plus outstanding interest.

I propose to treat first the negotiations and other events prior to and leading up to the closing on December 2, 1968.

Titan is a comparatively small conglomerate which in 1968 was basically in the real estate and construction business. With the boom market of that year, Titan was very interested in acquisitions of other companies. Then as now, it was in an exceedingly tight cash position. Moreover, at that time and over the years to date, Titan has sustained several changes in equity control and even more changes in top management.

Early in 1968, Titan had come under the dominance of what is known and as was referred to in this trial as the Block group. That group installed Anthony

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Frank as president of Titan in the spring of that year. Benjamin Robinson then as now a New York lawyer although not literally a member of the Block group was and continued to be chairman of the board of Titan. A long standing associate and business acquaintance of his was the defendant Harold Faggen. Harold Faggen is a law graduate, albeit, as far as I can determine, he has never been a practicing lawyer. He is also a certified public accountant and actuary and his field of expertise, basically, has been in the accountancy profession.

In 1968 he was the successful owner and executive head of an actuarial business. The core of his business success then was the acquisition and retention of many clients, particularly unions and union pension and welfare funds.

Essentially at that time the bulk of his business was done under the name and style of Harold Faggen Associates, Inc. As indicated heretofore, however, Faggen also did business through three other corporations, the stock of which he owned and those corporations I named earlier.

As stated, he and Ben Robinson had close business and professional contact. Indeed, several of the unions and pension funds represented by Faggen as an

rkjw 9 *Corrected Page* 1144

Price, Waterhouse and more particularly, Levin Townsend and Diebold Corporation. Thus, in the second quarter of 1968 with the assistance of a man named Rogoff working for Diebold who prepared projections of income for the Faggen companies which among other things recognized distinctions between accounting for private firms and for public firms, Faggen made presentations to these companies just mentioned.

In the course of these discussions, particularly with Levin Townsend and Diebold, it appeared that these firms had suggested, albeit not firmly offered figures from five million to seven million to acquire the Faggen companies. Faggen discussed these conversations and tentative negotiations with his friend Ben Robinson, who list little time in putting Faggen in touch with Anthony Frank. Both Robinson and Frank made it reasonabbly clear to Faggen that Titan would be interested to acquire his companies. As a result, Frank had Kaufman come to New York from Los Angeles and take up discussions with Harold Faggen. Their first meeting of substance came on September 6, 1968 in the Robinson law offices on Park Avenue, New York City.

As far as I can tell, no specific price was discussed of certainly was not negotiated that day between

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Kaufman and Faggen, but it does appear that Kaufman looked over what is in evidence as Exhibit 1 in whole or in part, a set of projections prepared in large measure by Rogoff and Faggen.

More than that, Kaufman looked over the tax returns of the Faggen companies for 1968. They discussed in general the acturial business and the prospects for the Faggen companies, at least in theory, in the field of data processing.

A much more significant and detailed meeting occurred thereafter on October 2, 1968, also in New York. Frank was apparently present at this meeting for a relatively brief time but Faggen and Kaufman were the principal participants. Faggen and Kaufman went over the Faggen company tax returns for the previous four or five years. They also appeared to have discussed the balance sheets at least to the extent of the cash position or net worth of the Faggen companies.

There then followed another meeting on October 6 and this one was principally concerned with conversation between Frank and Faggen; and at the request of Frank, Faggen delivered to him, Frank, a handwritten memorandum of a brief narrative and statistical summary

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of accounts of the Faggen group and their employees at least in terms of numbers.

There was also apparently a pro forma which was prepared by Faggen or someone in his organization which was part of that exhibit, which we know as Plaintiff's 2. Frank thereupon proceeded to have that particular document typed up and that is in evidence as we know it as Plaintiff's 3.

Going back to October 2, it appears that at the conclusion of that meeting, both Faggen and Kaufman shook hands on a tentative deal which would be subject to board approal and the workingout of specific details by financial and legal representatives, particularly of Titan.

Now, it would also appear, although it is not entirely clear because of certain equivocal testimony both by Mr. Kaufman and in my judgment Mr. Faggen, that it was at the October 2 meeting that Kaufman took the income for 1968 and estimating the adjusted pre-tax income from those figures to be about $550,000, negotiated Faggen down from a price originally suggested by Ben Robinson of about $7 millon when he first talked

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summarize briefly at this moment to say that Kaufman understood full well that this was a deal which was attractive because it was an acquisition and it looked as though the actuarial business might be put together very neatly with some of the mortgage and real estate business which Titan was already into, and that possibly there was a chance for some data processing melding which in the future would be potentially exciting and profitable. More than that, I think Kaufman was bemused as many other persons were bemused by the strong asset and cash liquid asset position of the companies of Harold Faggen.

Now, as stated on October 6, Frank, , as he put it, got very excited about the figures, most particularly in respect to the net worth of the Faggen companies. Also as Frank put it, he was excited about the possibilities that might be made or put into effect once the Faggen group was merged into Titan to build upon the computer capacity such as it was of the Faggen companies.

Frank was also aware, as was Kaufman, that Ben Robinson, chairman of the board wanted this deal and therefore he wanted to do the best he could to see to it that this deal was sold to the board of directors.

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I believe that largely for this reason, he asked Faggen to prepare a presentation and give it to him the following day and as indicated, this was done and as a result, Plaintiff's 3 came into being.

Two days after October 7 and on October 9 was held the board of directors meeting which, inter alia, took up the question of the Faggen group acquisition.

According to plaintiff in this lawsuit, the board members relied heavily on the pro forma of earnings which were typed up and incorporated in Plaintiff's 3 in evidence but this claim is substantially undercut by a number of other matters of evidence in this case. To begin with, although the plaintiff argues otherwise, the minutes of that board meeting by no means indicate that this was so. Beyond that, the plaintiff called a number of director witnesses, that is, witnesses who had been directors in the fall of '68 at the time when Titan made this acquisition. Only one of these witnesses, Frager, recalled any discussion of earnings at all at this meeting and he wasn't particularly explicit on just exactly what was said and even if I am wrong on that, it is abundantly clear from any fair reading of Frager's testimony, that this wasn't as important as such other facts as the fact that Chairman Robinson

rkjw 15 *Corrected Page* 1150

wanted this deal and that Titan was in a cash position of a very tight nature and here was an acquisition which would pick up between $1 and $1.3 million cash.

Now, it is true, however, that at that board meeting, Frank had with him Plaintiff's Exhibit 3. It is also true that he did not physically distribute this to the board members. The only evidence that any board member ever saw this document within its four corners is the testimony of witness Hegy, a member of the board who was not present at the October 9 meeting. He was away, he came back after the board voted on this acquisition and Frank did present to him for his consideration and reading the exhibit which we know as Plaintiff's 3.

Obviously this had nothing to do with the decision of Titan to acquire the companies because Hegy only read it after the fact.

Suffice it to say that the board of directors on October 9 voted to acquire the Faggen companies subject to investigation and approval of the financial and other details by the executive committee of Titan and by the Robinson firm in respect to legal matters.

Of considerable interest and importance is

rkjw 20 *Corrected Page* 1155

Harry Rosen and finally and unhappily as event turned out from the Harold Faggen selfish point of view, Mr. Robert James Frankel became chairman of the board. Frankel had first come into contact with Titan througha friend of his who was a member of the Robinson law firm. This was in the spring of 1969. Frankel was successful in negotiating the sale to Titan of a construction company of his known as Soverign Construction Company. He was elected as a director of Tian in 1970 at the annual meeting ofthe stockholders and not long thereafter, in February of 1971, Mr. Frankel became chairman and chief executive officer of the Titan group. Not surprisingly, since he assumed the latter office, he came smack up against one of the usual bugaboos of the Titan group, lack of cash. At about the same time he met Harold Faggen and in all places, the Yale Club, and immediately he tried to get Faggen and his so-called Faggen group to cast up more cash for the parent company. At least in human terms, it is not surprising to learn that Faggen reminded or pointed out to Frankel, that Titan had acquired at least $2 million worth of cash and marketable securities after the Titan group had acquired the Faggen companies

Indeed, between 1968 and 1972, Titan withdrew at least $2.1 million in cash and securities from the Faggen Companies, and that therefore he was not at all enthusiastic in weakening the Faggen group

rkjw 23 *Corrected Page* 1158

they were no longer going to pay any interest on his notes.

Now, briefly summarized, plaintiff's principal contention in this federal court litigation is that Harold Faggen made knowingly false material statements concerning the financial and business facts of his four companies upon which Titan relied prior to the execution of the contracts on December 2, 1968 in acquiring the capital stock of these Faggen companies in exchange for $5.5 million worth of convertible debentures issued to Faggen.

Put differently, in lawyers' terminology of a simple kind, plaintiff claims there was fraud in the inducement and that this was not only a violation of Rule 10b-5, but it was also common law fraud of the most egregious nature.

Specifically, Titan contends that the income figures set forth on the pro forma attached to Plaintiff's 3 in evidence were knowingly false in a materially significant way. According to Titan group, its accounting experts who have testified at trial and who prepared various financial documents and computations relating to the condition of the Faggen companies in the year 1965 to and including 1968, which computations were

rkjw 24 *Corrected Page* 1159

made of course after the commencement of this lawsuit, have proved that the figures submitted by Faggen in what we call Plaintiff's Exhibit 3 to be materially false and intentionally so to the knowledge of Faggen.

In addition, Titan makes a number of other contentions, some of which this Court regards as bordering on the absurd as follows:

Faggen was and is guilty of a conflict of interest in that he did not advise the Titan negotiators and representatives that Ben Robinson had represented him or his companies as a lawyer and that there had been a long relationship whereby they both represented the same unions or the same union pension funds.

Additionally, it is claimed that Faggen falsely stated that he and his companies had in being, a model for a computer program for the pension plans of small accounting firms, small law firms and their clients.

Additionally it is alleged that Faggen falsely covered up the fact he had lost substantial clients in 1968 and there was a clear danger of losing other major clients in the foreseeable future.

On the other side of the coin, the defendant has contended that there is no truth in these allegations as a matter of fact. Beyond that, the defendant has

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and successful inventor was taken into account in List.

A similar case is the Third Circuit decision Kohn versus American Metal Climax, 458 F. 2d 255, 290.

In any case, whatever the circumstances and facts may have been in all the case law that we know of and certainly in the two cases I cited, if here there was a case where reliance ought to have to be proved by a preponderance of evidence, it is here. We had sophisticated parties. Indeed the balance of sophistication and know-how rested heavily in favor of the plaintiff, Titan group. This was a face-to-face deal and even Titan group as late as early 1970 was telling everybody in the world who would read their annual reports that this was so. It was put on a proxy statement in that year and that document, of course, was distributed to the public after approval, presumably, byt ehe by the Securities and Exchange Commission.

I am totally unpersuaded or I certainly am not persuaded by a preponderance of the evidence that there was any such great reliance as Titan group now argues on the pro forma attached to Plaintiff's Exhibit 3. I believe the real reliance was in quite different areas, such as number one and perhaps most importantly,

rkjw 35 *Corrected Page* 1169

Mr. Frankel found Faggen a difficult man to deal with. I don't blame Frankel for that. I can surmise that Faggen is a little bit feisty and difficult and was probably a prickly rose to put it kindly, once he and Frankel started toargue over the interest due and the data processing business as Frankel saw it, as opposed to how Faggen saw it, but I am afraid that all of that has permeated this lawsuit. Both sides have been assiduous in covering each other with mud and like everybody else,we are dealing with human beings and there is a lot of mud around for both sides, particularly post-acquisition, but that doesn't help the proof of the plaintiffs case except in respect to perhaps the figures.

I have already held that the figures, really, are meaningless, at least to the extent that they were relied upon as plaintiff argues. However, I think in fairness, these figures out to be discussed and analyzed a bit.

It has been stated that Plaintiff's 1 contained and in fact it does, contain the 1968 income pre-tax for the Faggen companies to be about $571,000. That is true. Those schedules which Rogoff and Faggen prepared do show that.

I accept the argument of the defense, however,

rkjw 38 *Corrected Page* 1172

which Titan group understandably submitted ought to be reduced and the like.

Though the picture is not as clear as a selfish matter you would like to see it as a finder of facts, I am certainly not persuaded that the plaintiff's version of all of this is in fact correct.

Thus, the reconstructed figures of the accountants who worked on this matter and who testified for plaintiff at this trial are suspect because they made certain assumptions in this area which I do not find supported clearly in the evidence. Not only that, although Mr. Powers is correct, I believe in suggesting that when Frank and Kaufman and Faggen were talking prior to October 9, 1968, they both were mixing up both accrual methods of accounting and cash methods almost necessarily. There is nothing wrong with that. It doesn't follow from that that the accountants who did the post-litigation commencement work here were following the same methods which the Faggen company books were kept on at the time of the negotiations in the fall of '68.

Not only that, as indicated, I think they made certain assumptions about the adjustments and certain assumptions about income from investments which are not clearly supported.

OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

TITAN GROUP, INC.,

Plaintiff,

-against-

HAROLD FAGGEN,

Defendant.

----------x

MEMORANDUM

72 Civ. 1797 HRT

TYLER, D.J.

Following this court's rendition of findings of fact and conclusions of law on March 19, 1974, the last day of the trial herein, defendant's counsel submitted a proposed judgment awarding damages on his counterclaim to the court on March 22, 1974. Several days later, on March 26th, plaintiff's counsel submitted a motion entitled "Motion Requesting Hearing on Issue of Amount of Damages". That motion and defendant's arguments in support of its proposed judgment were heard on April 8, 1974.

At the conclusion of argument on the latter date, this court ruled on certain branches of plaintiff's motion as and for the reasons set forth by the undersigned on the record. Briefly, those rulings may be summarized here

as follows:

1. In agreement with counsel for plaintiff, this court refused to grant defense counsel legal fees as prayed in the amount of $250,000 or, indeed, in any amount until the record thereon is amplified and a hearing is held on that issue; and

2. The court denied the belated and spurious claim of plaintiff's counsel that plaintiff had reserved the right to try out before this court its claim (which is the subject of a pending suit in the Supreme Court of New York, New York County) that defendant kept "key clients of the businesses sold by himself and his mismanaging and diverting existing clients of the businesses to himself over the past two years." 1/

1/

In effect, plaintiff's counsel argued: (1) a memorandum order of Judge Ryan permitted plaintiff to try these issues to this court, and (2) counsel specifically advised the undersigned trial judge that plaintiff was reserving such right at page 853 of the record. Accepting arguendo counsel's understanding of Judge Ryan's memorandum, I cannot assume and accept his interpretation of the colloquy at page 853 of the trial transcript. This is particularly so in light of the fact that the undersigned has been advised of the pending state action and had assumed that the parties were prepared to litigate that "non-federal" claim or claims in the state court.

Decision was reserved, however, upon what appears to be a more significant issue -- that of whether or not an award to defendant of the face amount of his convertible notes under the acceleration clause thereof amounts to an unenforcible penalty. Typically, plaintiff's counsel has submitted a welter of specific arguments and case citations, most of which appear to be irrelevant to the point; similarly, the reply papers of defense counsel do not cast up any discussion or authorities which are germane or helpful. Nevertheless, as will be seen hereinafter, independent research by the court suggests that the basic argument of plaintiff in this area deserves serious consideration.

This issue arises because defendant has requested judgment against plaintiff on his counterclaim in the amount of $5,500,000.00. together with interest of $878,535.68.

In return for selling his business to Titan on December 2, 1968, Faggen received Titan's 4% Convertible Installment Notes payable in five installments beginning November 1, 1978. The 4% interest was to be paid semi-annually, on May 1 and November 1 of each year. The notes could be converted for restricted stock at the basic rate of one whole share of common stock for each $20.00 of the unpaid principal [2/] any time after January 1, 1969. At the time of plaintiff's

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2/ $750,000 of the notes, however, were convertible at the rate of $15 per share.

acquisition of the Faggen companies, December 2, 1968, the Titan stock was at 17-3/8 bid a share on the market. The notes also contained an acceleration clause which provided, among other things, that all the notes would become immediately due if any installment of interest remained unpaid for fifteen days after Titan had written notice of its default. The interest due on May 1, 1972 was not paid; Faggen, therefore, has sought to accelerate the payments due him. Titan, as indicated, has argued that to accelerate the installment payments would be to enforce a penalty.

It is generally accepted contract law that installment contracts which provide for acceleration upon default are enforcible according to their terms. See, 5 Corbin, Contracts Sec. 1065. Cf. Graf v. Hope Bldg. Corp., 254 N.Y. 1, 171 N.E. 884 (1930). The interest due on the unpaid installments, however, may not be accelerated. 3/ Moreover, if the parties have added the interest to be due to the principal and then divided the sum into installment payments, the acceleration clause should be unenforcible since it would result again in the payment of unearned interest. A-Z Servicenter, Inc. v. Segall, 334 Mass. 672, 138 N.Y.2d 266 (1956). See, also 5 Corbin, Contracts Sec. 1065.

The notes at issue bore interest at 4% annually. Faggen

3/ Faggen and his counsel accept and agree to this proposition.

in his requested judgment does not seek to recover the future interest due. Titan, however, argues that the face amount of $5,500,000 fixed for the notes was established by adding interest to be paid to the principal. The stated 4% interest rate is explained away by Titan's counsel as a mere formality designed to prevent any interest from being imputed to Faggen. Adopting the finding of Frederick Shinagel, Faggen's expert, Titan now takes the position 4/ that at the time of the acquisition the notes were worth only $3,200,000 and the $5,000,000 face amount factored in an additional 7% interest rate. An interest rate of 11%, plaintiff argues, is a much more reasonable interest rate than 4% for a ten year installment contract. This ingenious post-decision argument is supported by neither the documents nor other evidence of record.

The notes received by Faggen, in any case, were more than simple installment notes payable over a period of ten years. The notes also contained what was originally regarded as potentially valuable conversion rights. Indeed, it seems probable that this conversion possibility represented an important aspect of the notes and that the stipulated interest was regarded as relatively unimportant. This supposition is buttressed by the fact that the prepayment provision of the notes required

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4/ A position which differs rather substantially from Titan's trial posture regarding Shinagel's valuation testimony.

Titan to pay more than 100% of the value of the notes if it chose to prepay any part of the principal amount of the outstanding notes.

Given these facts, it cannot be said that the face amount of the notes contained or contain a concealed interest rate. Moreover, the default by Titan on the interest payments here was deliberate and not the result of a technical oversight. Titan could have chosen to pay the interest into the court for the duration of this suit but it did not do so. As a result of Titan's breach, Faggen experienced financial restraints and difficulties with lending institutions and others to his financial detriment, a fact which is at least of some relevance to a determination of whether the acceleration clause is an unenforcible penalty.

Finally, and perhaps most compellingly from an economic standpoint, it seems unrealistic to argue, as plaintiff does, that Mr. Shinagel's appraised valuation of $3,200,000 for the notes as of December 2, 1968 is appropriate value of the judgment now to be awarded Faggen on his counterclaim. Obviously, Faggen on the closing date did not receive $3,200,000, let alone the face amount of $5,500,000. Rather, he assumed the risks of the conversion to common stock with concommitant exposure to the vicissitudes of the market - and, in the event that conversion was not feasible, of Titan's ability to continue

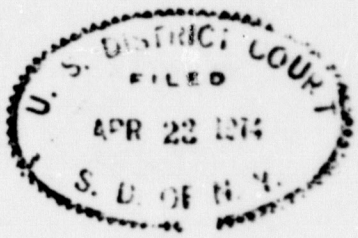
to meet the interest payments at a comparatively modest rate and eventually pay off the principal. Given the decline of Titan's business and financial positions since late 1968, these were far from insubstantial risks, as the evidence adduced at trial plainly established. It cannot be said, however, that at the time of the sale, Faggen's business was not in fact worth $5,500,000 to Titan. Given this fact, it would not be proper for this court to say that the $5,500,000 in notes received by Faggen represented a concealed interest rate of $2,300,000. Moreover, the fact that Faggen agreed to certain unfavorable provisions in the notes is certainly no reason to refuse to enforce a provision of the notes which operated in his favor. Thus, it is difficult to view money damages in excess of $3,200,000 as constituting a penalty against Titan.

For the aforementioned reasons, it is determined that Harold Faggen is entitled to judgment on his counterclaim in the total amount of $6,378,535.68, which judgment will be entered without delay. Rule 54(b), F.R.Civ. P. The question of legal fees for defense counsel under the terms of the notes will be the subject of a further hearing and separate judgment, if the latter is appropriate.

Dated: April , 1974

U.S.D.J.

JUDGMENT



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

TITAN GROUP, INC.,

Plaintiff.

-against-

HAROLD FAGGEN,

Defendant.

----------x

72 Civ. 1797

JUDGMENT (H.R.T.)

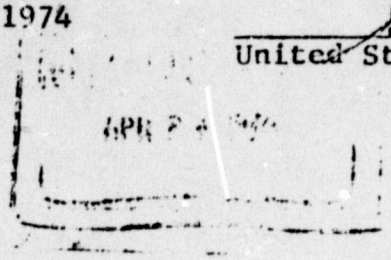
The issues in the above entitled action having been brought on regularly for trial before the Honorable Harold R. Tyler, Jr., on February 19, 20, 21, 22, 1974, March 5, 6, 7, 13, 14 and 19, 1974, and, at the conclusion of the evidence, the court having rendered a decision constituting its findings of fact and conclusions of law directing that judgment be entered in favor of the defendant dismissing the complaint and that judgment be entered for defendant on its counterclaim, ~~it is~~ and the Group Court having filed its supplemental memorandum decision ~~ORDERED~~, ADJUDGED AND DECREED, that the defendant, Harold Faggen, have judgment against the plaintiff, Titan Group, Inc., dismissing the complaint, and it is further

ORDERED, ADJUDGED AND DECREED, that the defendant, Harold Faggen, have judgment against the plaintiff, Titan Group, Inc., on his counterclaim, in the amount of $5,500,000.00, together with interest from November 1, 1971 to May 1, 1972, at 4% per annum, in the sum of $110,000.00, and interest from May 1, 1972 to the date of judgment herein, at 7% per annum, in the sum of $768,535.62.

for total interest in the amount of $878,535.68, plus attorneys' fees in the amount of $250,000.00, for a total judgment of ~~$6,628,535.68~~ $6,378,535.68, with costs to be taxed by the clerk.

Dated: New York, New York
March 22, 1974
April 22

United States District Judge



Edward J. Bergdorf
Clerk

Judgment

At a Stated Term of the United States District Court for the Southern District of New York, held in the United States Court House in the Borough of Manhattan, City of New York on the 19th day of FEBRUARY in the year of our Lord, One Thousand Nine Hundred and SEVENTY-FOUR.

PRESENT:
HONORABLE: HAROLD R TYLER, JR.
United States District Judge.

TITAN GROUP INC.
VS
HAROLD FAGGEN

Docket No. 72 Civ. 1797
H.R.T.

Now comes the Plaintiff By POWERS & GROSS
By. LAWRENCE M. POWERS, ESQ
and moves the trial of this cause. Likewise comes the Defendant by BURTON COOPER, ESQ
687-8800 ~~Plaintiff~~

Thereupon ~~[illegible]~~ the cause proceeds to Trial.

2/19/74 - CIVIL - NON-JURY BEFORE JUDGE TYLER.
2/20/74 - TRIAL CONTINUED
2/21/74 " "
2/22/74 " "
3/5/74 " "
3/6/74 " "
3/7/74 " "
3/13/74 " "
3/14/74 " "
3/19/74 " " & CONCLUDED

FINDINGS OF FACTS & CONCLUSIONS OF LAW
JUDGMENT FOR PLTF. DISMISSING COMPLAINT
JUDGMENT FOR DEFT. ON COUNTER CLAIM GRANTED

JOSEPH CASCARDI

(AN EXTRACT OF THE MINUTES)

AMENDED JUDGMENT

United States District Court
Southern District of New York

Titan Group, Inc.,	:	
Plaintiff	:	
-against-	:	72 Civ. 1797 (HRT)
Harold Faggen,	:	
Defendant	:	

Judgment in the above entitled action having been entered on April 22, 1974 in the amount of Six Million Three Hundred Seventy-Eight Thousand Five Hundred Thirty-five and 68/100 ($6,378,535.68) Dollars, and this court having reserved, for supplemental judgment, the question of legal fees for defendant's counsel subject to a further hearing and separate judgment, and this court having held a further hearing on June 4, 1974 on the question of legal fees for defense counsel, it is

ORDERED, ADJUDGED AND DECREED that the defendant Harold Faggen have judgment against the plaintiff Titan Group, Inc. in the amount of Seventy-Five Thousand Five Hundred and Twenty ($75,520) Dollars, in addition to judgment rendered April 22, 1974.

Dated: June 13, 1974

/s/ HJT
U. S. D. J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TITAN GROUP, INC., Plaintiff,	72 Civ. 1797
-against-	NOTICE OF APPEAL
HAROLD FAGGEN, Defendant.	

S I R S:

PLEASE TAKE NOTICE THAT Titan Group, Inc., the plaintiff in the above-entitled action, hereby appeals to the United States Court of Appeals for the Second Circuit from each and every portion of the Judgment entered herein on April 22, 1974 in favor of the defendant and against the plaintiff, and further appeals from any Amended Judgment or Supplemental Judgment entered herein subsequent to the date of said Judgment of April 22, 1974, from the Findings of Fact and Conclusions of Law directing that judgment be entered in favor of the defendant dismissing the complaint and that judgment be entered for defendant on his counterclaim, and from the Supplemental Memorandum dated April 22, 1974 filed by the Court, together

with certain Findings of Fact and Conclusions of Law entered on the record herein in support thereof.

Dated: New York, New York
April 30, 1974

Yours, etc.

POWERS AND GROSS

By _____
Lawrence M. Powers
Attorneys for Plaintiff
Office & P. O. Address
110 East 59th Street
New York, N.Y. 10022
(212) 752-8004

TO:

SHEIB, SHATZKIN & COOPER
Attorneys for Defendant
235 East 42nd Street
New York, N.Y. 10017

CLERK, UNITED STATES DISTRICT COURT
Southern District of New York
United States Courthouse
Foley Square
New York, New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

TITAN GROUP, INC., :

Plaintiff, :

vs. : 72 Civil 1797

HAROLD FAGGEN, :

Defendant. :

----------x

Before:

Hon. Harold R. Tyler, Jr.,

District Judge

New York, N. Y.
February 19, 1974 - 10 a.m.

APPEARANCES:

Powers & Gross, Esqs.,
Attorneys for plaintiff,
By: Lawrence M. Powers, Esq., of Counsel

Burton Cooper, Esq.,
Attorney for defendant,
By: Burton Cooper, Esq. and
Edward Labaton, Esq., of Counsel

MR. POWERS: We have previously supplied to the Court a copy of our brief for the appellee to the Second Circuit which summarized our fundamental factual contentions. The Court also has before it, I just handed it up and I know Your Honor hasn't had a chance to read it, our proposed findings of fact and conclusions of law. But roughly they track what Your Honor has already read in our brief to the Second Circuit.

The essence of this case is a claim of inducement of an acquisition contract for the exchange of securities through fraudulent misstatements of material facts in written items and fraudulent omissions to disclose material facts in written items. I am going to, in the interest of separating the issues, restrict my opening presentation to the sole issue of liability alone and I restricted my findings of fact and conclusion of law to that issue and at this point I would like to get right to work with a witness to begin making our proof on the issues of liability.

THE COURT: All right. Mr. Cooper, do you want to make any opening?

MR. COOPER: Yes, Your Honor. I don't know how much of an opening statement Your Honor would want and I don't know how familiar you are--

THE COURT: As you understand, all I read are these briefs which you both have been good enough to give me. This is what you used in appealing to the Court of Appeals for this circuit. I have not had a chance to read your proposed findings.

MR. COOPER: Let me elaborate a little bit on the defendant's position in this case.

Our position has been since the inception of the lawsuit that this action is a sham and that it was a result of and followed a kind of coersion undertaken by the Board Chairman of the plaintiff corporation who was certainly not a director at the time the act complained of, but nevertheless verified the complaint in this action and in our findings of fact, I have preliminarily set forth an outline of the complaint in this case and the actual facts as they really developed both prior to the institution of this lawsuit and since the institution of this lawsuit.

Briefly, the complaint in this action alleges that the defendant delivered to the plaintiff a pro forma statement setting forth historical earnings for four years preceding the date of the acquisition. The date of the acquisition of defendant companies was on December 2, 1968 by elaborate contracts which contained numerous representa-

tions and warranties of historical earnings.

Attached to the contract documents were the income tax returns which were the specific exhibits to which the representations and warranties of historical earnings referred.

I understand that it is the contention in this case of the plaintiff that they were induced to enter into a contract by reason of this allegedly false and misleading pro forma. The pro forma that was referred to is attached to the complaint and simply the bottom line in numbers--

THE COURT: May I interrupt you, Mr. Cooper, to observe to you and Mr. Powers that the entire file in this case in the District Court is missing. Now, I assume this is because it is in the Court of Appeals somewhere, but we cannot, and I want this on the record very clearly and more importantly than on the record I want you both to know that we have nothing in the District Court files on this case except a few stray copies of unimportant documents.

MR. POWERS: In connection with the appeal, a volume was made up which was served on me containing all of the documents in the record, and you can use this for reference, with the exception of a few items, that were

an issue before between the parties and that document, you will have 95% of the record in this case.

THE COURT: Fine. I appreciate it. It is true, as you know, that I have a copy of that document, but I want you to know the original documents cannot be found in our Clerk's Office.

MR. COOPER: There are certain documents which are perhaps not in it, but in the appendix which I will advert to in a little while, Your Honor, and we will furnish copies, one of them being an Order of Judge Ryan in connection with a motion to amend the pleadings in this case which the Judge denied.

But I was talking to Your Honor about the pro forma statement of earnings that was made the basis of the complaint in this action. The pro forma statement, as I said, the bottom line numbers-- and it doesn't contain any of the analysis of how those numbers were arrived at and the contract documents with their income tax returns attached and they are not challenged in this case. The plaintiff not only doesn't challenge them, but during the course of the motion for summary judgment they caused an audit and analysis to be made of the income and earnings of this company for the four years prior to acquisition and dollar for dollar the amount showed up to be in

accordance with the representations and warranties made in these contracts.

The pro forma was a document that was arrived at as a result of adjustments which the parties have now pretty well defined to mean adjustments attempting to show what the earnings of the privately held company would have been had it been publicly owned for the four prior years preceding 1968. The document itself is headed "Income Pre-tax Adjusted to Basis Which Will Prevail Prior to Acquisition."

And now, there were two negotiating sessions in this case with a man by the name of Edmund Kaufman, a skilled merger and acquisition attorney who came from Los Angeles and who represented plaintiff at this time and in the negotiations leading to this transaction. Mr. Faggen was not represented by counsel and at the time that these discussions took place, at the second meeting which occurred October 2, 1968, Mr. Kaufman had before him the income tax returns of Mr. Faggen's companies.

He also had another document which, for the purposes of this discussion I will refer to as the Diebold memorandum, which was a memorandum that had been used by Mr. Faggen in connection with another negotiation with another potential acquiror.

At the time of the second meeting with Mr. Kaufman in October of 1968, they arrived at a price and that price was as the documents spell out, $5 1/2 million in convertible notes, subordinated to all all indebtedness except general creditors. These notes were payable at 4% interest with amortization not to begin until six years and running to the tenth year.

Following the meeting of October 2, 1968, the parties proceeded to draw these elaborate contracts and, at the time of the preparation of these contracts, Mr. Faggen retained the services of Mr. Simon Scheib as his attorney and since Mr. Kaufman was located in California, he used the services of the firm of Robinson, Silverman, Pearce, Borden & Ball, I think that was the firm name at the time and has since been changed to Robinson, Silverman, Pearce, Aronson & Sand.

Now, the basis under which we claim that this action was a sham is as follows:

First, there is nothing that the parties sought in terms of representations and warranties regarding the earnings of these companies in the course of the contract preparation that they didn't get. The contract in its first draft was prepared by Mr. Kaufman. That first contract draft was sent to Mr. Robinson's office

and Mr. Michael Rosen of Mr. Robinson's office handled the transaction there.

When the contracts were negotiated, all drafts of the contracts were referred back to Mr. Kaufman and they were all red lined showing any changes in those contracts. At no time did Mr. Kaufman ever tell Mr. Rosen or anyone else that he had negotiated this transaction on the basis of any restatement of earnings or what that restatement was, nor did he request a representation in warranty dealing with the restatement of earnings.

There was a gentleman by the name of Mr. Frank, the then president of the company, who presented the potential acquisition to the Titan board on October 9. On October 9 when the board was told about this potential acquisition, the board minutes reflect only that Mr. Frank told the board of the kind of business that the Faggen organization conducted, which was an actuarial service business. There was no reference in the board minutes at all to the alleged pro forma earnings.

When the board approved in principal this transaction, they approved it conditioned upon executive committee final approval and the executive finally approved this transaction on the date on which the con-

tracts were signed, which was December 2nd.

Not only did none of the principals who were involved in any of the negotiations ever request that this pro forma be part of or be made a representation in this acquisition, they also acknowledged in their proxy statement to shareholders in 1969, it refers to this acquisition, that this acquisition was the result of an arm's length transaction, each side separately represented by counsel and each side fully-- I am sorry-- the transaction was fully investigated and the financial condition, business and assets of the Faggen Companies were fully investigated. They made that statement to their shareholders in May, 1969 proxy materials.

At that time, in May of 1969, Edmund Kaufman had become Chairman of the Board of Titan and he was not in October of 1968 a member of the Board.

I might digress a moment to point out that Mr. Kaufman was the representative of the group known as the Block group which he designated as the Control group. The Block group acquired their large holdings in the Titan Company in March of 1968 and shortly thereafter Mr. Frank, by their direction, was installed as president, and Mr. Kaufman was the person designated by Mr. Frank and by the Block group to negotiate this transaction on behalf

of Titan.

Mr. Kaufman became Chairman of the Board in, I believe, March or April of 1969. He became a director at the same time Mr. Faggen became a director, which was in December, 1968. Thereafter, during the course of Mr. Kaufman's tenure as Chairman, he acknowledged both to the shareholders and to the directors that the Faggen Companies' operations were profitable, but their profitability had declined by reason of the designation by management of Titan to expand the operation into a data processing business.

Mr. Kaufman left the Titan organization as Chairman in the latter part of 1970. In 1971, Mr. Frankel, the gentleman who verified the complaint and who, by the way, is a New York attorney, Mr. Frankel became Chairman of the Board in the early part, perhaps February of 1971.

At the time of the acquisition of the Faggen Companies, the Titan organization was going through a very severe liquidity problem, cash flow problems. At the time of Mr. Frankel's ascension to the Chairmanship of the Board, again, Tital was going through some very severe liquidity problems and immediately upon becoming Chairman of the Board, Mr. Frankel began a campaign to

coerce Mr. Faggen into converting his notes into shares of stock in the Tital organization. That attempted coersion took various forms, the first of which was a default on the interest payments of the notes in May of 1971. The notes, by the way, are due semi-annually; May and October.

He defaulted in May of 1971 in the payment of interest and when this matter was brought to the Board and he told him about it, nothing was done with respect to Mr. Faggen's operations at that point, but Mr. Kaufman, who was still a director and was about to go off the Board anyhow, wrote a letter to Mr. Frankel shortly after that meeting, taking serious objection to the default of interest on the payment of Faggen's notes. Mr. Frankel then secured that default and paid the interest.

Mr. Frankel then brought Mr. Faggen in and told him in words or substance that "If you don't convert your notes into stock, we are going to take this company and make it a shell. We will get ours out first, we will borrow like hell and you won't have anything left." He did this with two other directors, Mr. Duffy and Mr. Rosenfeld.

These threats went on through the summer of 1971, long before anybody even thought of or contrived

this lawsuit. In September of 1971, Mr. Frankel produced a complaint by an attorney by the name of Sidney Silverman. In that complaint there was not ten but five allegations, but what was alleged was that Mr. Faggen and Mr. Robinson had conspired together to make this deal back in 1968. The Board refused to file that complaint, refused to make it and, in October of 1971, interest payment was again paid, but there was another interesting bit of byplay going on at the same time.

Mr. Kaufman, who had been Board Chairman, the attorney and no longer a director, had submitted fees for legal fees for his firm totaling some $133,000. At the time Mr. Frankel became Chairman he attacked Mr. Kaufman, alleged that Mr. Kaufman and his firm engaged in a conflict of interest and a breach of fiduciary duty in connection with the transaction out in Yosemite and during this period of December of 1971, there was this running dispute between Kaufman and Frankel.

In October or November-- November of 1971, Kaufman settled this claim with Titan, took 10,000 shares of restricted stock and got a release from Titan with respect to this conflict and, at the same time, entered into negotiations with Frankel to turn over to him what he claims were matters that had been discussed with Faggen

back in 1968 and became a witness for Mr. Frankel.

Your Honor, I know I have taken a long time in this opening statement, but what I was trying to do was to demonstrate to Your Honor that this case is nothing more than a contrivance with respect to the legal point that I wanted to make because I think they are going to come up very early in this case and it is one of the contentions of the plaintiff here-- of the defendant here-- that this case is governed by the Parole Evidence Rule or by a doctrine enunciated in the Court of Appeals in the State of New York dealing with claims of inducement of fraud which is specious and where the Court held that in the event of a claim for fraud arising out of an inducement of contract, where the parties had a general merger clause but where they have engaged in an investigation of the very subject matter which is the subject of the contract, that no claim for fraud would lie.

By reason of that, it is the defendant's position in this case that either by reason of the Parole Evidence Rule or by that rule, that no evidence should be introduced or received in this case dealing with any alleged representations or warranties which go behind the representations in the contract.

THE COURT: There is no point in arguing that on an opening statement, that is an evidentiary matter.

I also point this out to you, that I am in no position to rule on anything until I hear some proof, and I might also add so long as there is no jury present and no one will be tarnished if it gets into your case, even if something is put on the record. It won't be the first time that my tender sensibilities have been exposed to the Parole Evidence Rule or the possible application, and I won't argue on evidentiary rulings and points on opening statements.

MR. COOPER: All right, Your Honor.

THE COURT: I have seen your papers.

MR. COOPER: Just one further point and I am concluding. I received just before we began today the proposed findings by counsel and in those proposed findings there are matters which are not embodied in the pleadings.

THE COURT: Again, you got to get started, Mr. Cooper. Whatever that may be, don't worry about that now. I want to hear some evidence.

All right, Mr. Powers, let's go ahead.

MR. POWERS: Thank you.

The first witness I would like to call is the defendant, Harold Faggen.

H A R O L D A A R O N F A G G E N, called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Would you state your age?

A I am 62 in May.

Q That would make you 57--

THE COURT: Let us not go into computations at this time, Mr. Powers, please.

Q How old were you at the time of the negotiations to sell--

THE COURT: Look, I can figure that out. Let us not go into those matters.

Q Mr. Faggen, are you a lawyer?

A I have a law degree. I haven't practiced law in 30 years at least. I did not really ever practice law except as it was part of accounting.

Q Where did you take your law degree?

A At the University of Richmond, Virginia.

Q Where did you study accounting?

A In Virginia.

Q Are you a Certified Public Accountant?

A Yes, I am.

Q Are you admitted to practice in New York State under that title?

A Yes, I am admitted in New York on a waiver.

THE COURT: Excuse me, you have to keep your voice up a little, Mr. Faggen. I have a great deal of trouble hearing you.

THE WITNESS: I am sorry, sir.

THE COURT: You are an accountant and a CPA under the laws of New York since when?

THE WITNESS: New York since about 1947 or 1948.

Q What other states have you been admitted to practice in?

A Virginia.

Q Mr. Faggen, would you describe the basic nature of the businesses that you sold to Titan in 1968?

A Basically they were known as actuarial consulting organizations.

Q Could you describe to the Court the kind of services they provided?

A Provided advice, actuarial advice, tax advice and so forth to pension funds and welfare funds.

Q Were these union pension and welfare funds?

A They were union or union-management jointly trusteed.

Q Did the Faggen Companies have clients other than the union pension and welfare field?

A I don't know how to answer that. They are related funds. They are funds that are known other than as welfare funds, but they are considered related.

Q All the business was related to the administration of pension and welfare funds for various unions; is that correct?

A Not for the various unions but for unions and union-management board of trustees.

Q You didn't do any actuarial work for any insurance companies, did you?

A No.

Q You didn't do any for any business corporations, did you?

A On occasion, but not as a regular matter.

Q Would you say that more than 95% of your business was related to the union pension and welfare funds?

A Again, if you encompass within the welfare these related funds which can be classified as welfare or not, vacation funds, unemployment funds and so forth.

Q By the way, how many related funds did the Faggen Companies have as clients in 1968?

A I don't recall.

Q Was it 140?

A I don't recall. There are notations of that.

Q Now, you said that these funds were related. Do you mean to suggest by that that you would have representation with a particular union and the Harold Faggen Companies would have that pension fund, the welfare fund and any other related funds stemming from that one union?

A No, sir, that is not what I meant by related. I meant related funds, related in type of funds.

They might have had a series of funds because there was a common union or they might not have and might have had others who handled some of the funds.

Q Now, when did you commence your negotiations for the sale of the Faggen Companies to the Titan group?

A I had my first session that I would term a negotiating session with Mr. Kaufman on September 6, 1968.

Q Now, at that time, could you tell me how many employees the Faggen Companies had?

A Approximately 30.

Q About 30 employees in four separate corporations, wasn't it?

A Yes.

Q Would you name those for the record, please?

A There was Employees Fund Services Corporation. There was a fund E&E Corporation which I believe had been in business only one year; Actuarial Tabulating Corporation and Harold Faggen Associates, Inc.

Q The primary corporation, and I mean the one that did most business and had most earnings was Harold Faggen Associates, Inc., is that right?

A That is correct.

Q The others in terms of revenues or earnings were relatively minor in terms of the total picture?

A That is correct.

Q But all four of the businesses were sold to Titan?

A That is correct.

Q In addition, you had a personal accounting and tax consulting practice which you conducted individually, is that right?

A That is correct.

Q And the proceeds of that were effectively sold to Titan as part of this overall transaction, is that right?

A I don't know how to classify that because some

of the work being done was as a CPA and obviously the corporation could not practice as a CPA. My understanding was that the corporation would pay for the salaries and other expenses of the people who might work in that and the payment to the corporation for that would be in an amount equal to the net of the individual practice.

Q Now, the individuals working on that were employees of Faggen Associates, Inc. or one of the other corporations, is that right?

A I think they were all employees of Faggen.

Q You said you had 30 employees. Could you tell me roughly how many of those were officers of the companies?

A I think there were only three who held--

Q Who were those individuals?

A That was myself, of course; Rose Dogan and George Stewart.

Q Rose Dogan is now Mr. Faggen, is she not? She was not your wife back in 1968?

A That is correct.

Q But worked for the Faggen Company in an executive capacity?

A That is correct.

Q In addition to the three executives you have

named for us, Mr. Faggen, did you have a group of consultants who worked on various accounts of the firm?

A Yes.

Q How many did you have in this group?

A I think there were six persons that we classified as consultants and I believe that we would have listed George Stewart as one. However, some of the actuarial personnel did work as consultants.

Q Can you name the six consultants who worked for you at that time?

A I don't believe I can.

Q One was a man by the name of Farkas?

A That is correct.

Q Another one was Stafford?

A That is correct.

Q And one was Farrera?

A No.

Q He wasn't with you in those days?

A Yes, he was, but he was not one of the consultants of the staff. He did some consulting. Farrera was the chief actuary.

Q Who had the basic responsibility for this consulting--

MR. COOPER: I object to this line of

questioning. I don't think it has anything to do with the issues in this case at this point.

THE COURT: It strikes me as sort of the cart before the horse at the very least, Mr. Powers.

MR. POWERS: It is only preliminary to give Your Honor some background on the business and the importance of the representations I am about to go into.

THE COURT: I would hope. I do want the identity of the parties and the companies, but on these details about employees, I think it is not helping much.

Would you break at this point? I have to see some Government lawyers.

(Recess.)

BY MR. POWERS:

Q Now, Mr. Faggen, would it be fair to characterize the responsibility of your consultants as being the basic client contact for the Faggen Companies? Would each consultant have a group of clients that he was responsible to handle?

A As a general rule, yes.

Q In addition to the six consultants, each of whom had a list of clients that he handled, you handled

several clients yourself, didn't you?

A Yes.

Q Rose Dogan handled several clients?

A I think she was more restricted; maybe one or two.

Q Now, Mr. Faggen, could you tell the Court who Benjamin Robinson is?

A Benjamin Robinson is, I believe, a partner in the firm of Robinson, Silverman, Pearce, Aronson, Sand & Berman, if that is the correct name.

Q Ben Robinson was Chairman of the Board and Chief Executive Officer of the Titan Group in 1968, wasn't he?

A He was Chairman of the Board. I can't really say that I knew whether he was Chief Executive Officer. I don't know that I ever heard that applied to him.

Q But you dealt with him as Chairman of the Board of Titan back in 1968, didn't you?

A I don't recall having any dealings with him as Chairman of the Board.

Q Did you talk to him?

A Surely.

Q Did you talk about the potential acquisition of

your companies by Titan with Mr. Robinson?

A I don't believe I discussed the potential acquisition of my companies with Mr. Robinson at any time except when I asked him whether he would make the introduction to Mr. Frank who was then the president, appointed as I understood it, by the Control group and who was running the company.

Q Just so that we get the person straight for the trier of the facts, Mr. Frank's full name was Anthony Frank, wasn't it?

A I believe so.

Q He was president of Titan in 1968?

A Not the whole year. He became president during 1968 after the Block group acquired control.

Q Now, you knew Mr. Ben Robinson in connection other than as Chairman of the Board in Titan, didn't you?

A Yes, I have known him for many years.

Q In what connection did you know Ben Robinson?

A He was counsel to, by 1968, several of the pension and welfare funds that retained my companies as consultants.

Q He used to meet with Ben Robinson regularly at meetings of the various pension and welfare funds that you are consultants to?

A If you won't restrict it to Ben Robinson but to members of the firm rather than Ben himself.

Q In addition to Ben Robinson, there was Alan Aronson, and apparently you met him?

A At the office.

Q You had some discussions with Alan Aronson about the prospect of selling your companies, didn't you?

A No, I don't believe I ever discussed that with Alan.

Q Wasn't the first meeting you had with Mr. Kaufman relating to Titan in Alan's office?

A Yes, but I did not have any discussion. His function was merely to introduce us.

Q Didn't Aronson introduce you to another prospective purchaser of your companies named Diebold?

A He had introduced me to an employee of the Diebold organization, but not with any idea of acquisition.

Q But in any event you did speak to Alan Aronson on at least two subjects relating to your company, is that right?

A Yes, I am sure he knew quite a bit about my companies.

Q Who else in the Robinson law firm did you work with in connection with your consulting activities?

A There was a man named James Gill.

Q In 1968?

A I don't remember when Gill came there, but I think he was there by 1968.

Q You used to work with a man named Matthew Silverman?

A Yes, all the way back.

Q You used to work with Saul Pearce, didn't you?

A I don't think Pearce ever did any work in connection with the funds. I don't recall. It seems to me some years back he did some collections, something in connection with checks of delinquent accounts, but I don't think he ever functioned as counsel to any of the funds.

Q With the delinquent accounts, the accounts of Faggen Companies?

A No, I am speaking about accounts of the funds.

Q Now, you were socially friendly with Ben Robinson in 1968, weren't you?

A I don't know how you define socially.

Q You had dinner with him on occasions?

A I think I may have had dinner with Ben Robinson two or three times over the period of twenty years.

Q You visited with his wife and with your wife, didn't you?

A I don't think we ever did. We may have, but I don't recall. Maybe once or twice in a period of twenty years.

Q Would it be fair to say you used to meet with him on the business of your consultant activities maybe three times a month or better?

A Robinson?

Q Or members of the firm.

A Members of the firm.

Q Were you in his office quite often in 1968?

A I don't think I was, as you put it, but their office quite often. We met but we met at the fund offices as often as at their office.

Q Would it be fair to say that you had cordial and respectful professional relations with Ben Robinson and partners in the firm in 1968?

A Yes.

Q That was true in 1967 and 1966?

A Yes, many years.

Q Now, when was the first time you have any discussion with Ben Robinson about selling your company?

A I would say the first time I mentioned it to him would probably have been sometime in the second quarter of 1968.

Q Where would that meeting have occurred?

A In his office.

Q Can you fix a date?

A No, I cannot.

Q Who was present?

A Just he and I.

Q What did you say and what did he say in the meeting?

A I had been talking to possible acquirors and and I didn't know a thing about how one goes about it, so I telephoned Ben one day, told him I would like to see him. I met with him and I asked him how does one go about it. His answer was, "I don't know" or words to that effect. "I never worked on any of these."

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Q Would you characterize his response as he really didn't know any more than you did?

A I would say so. That is about what it amounted to.

Q When was the next time you spoke to Robinson about the possible sale of your companies?

A I think it was after I attended a meeting of the stockholders of Titan and had met Frank, I guess that would have been May of 1968 and shortly thereafter, it occurred to me that I might want to meet him. I liked

him from the little that I saw of him at the stockholders meeting. I liked what he outlined as the future of Titan, changing it from a real estate holding to some kind of operating company, and I thought that this might be a potential acquiror and I mentioned to Ben that I thought I would like to see and speak to Frank and if he couldn't see any objection. He said no, not only doesn't he see an objection, he will arrange an introduction. That is the way it went.

Q In the spring of 1968, the second quarter?

A Somewhere around May of 1968. It would have to be after May. I believe the stockholders is the latter part of May, so this would have had to be in June.

Q Maybe the first week in June?

A I don't know just when.

Q Up to that point, Mr. Faggen, had you been discussing the sale of your company to any other companies?

A Yes.

Q Was one of those Price, Waterhouse, the accounting firm?

A Yes.

Q You had certain meetings with Price, Waterhouse in the spring of 1968, didn't you?

MR. COOPER: I object to this. I object to any evidence regarding discussions Mr. Faggen may have had with any other companies.

THE COURT: I will take that.

Q Your testimony, Mr. Faggen, is that you had a couple of meetings with Price, Waterhouse with a view toward selling your business to them?

A No. I met with Price, Waterhouse I think only once, maybe twice, but once is all that sticks in my mind.

Q In any event, those negotiations went nowhere, did they?

A That is correct.

Q Did you have some negotiations with a firm called Levin-Townsend & Sons in the spring and summer of 1968?

A I don't recall when, but I had conversations with them.

Q In connection with your discussions with Levin-Townsend, did you give any earnings about your companies?

MR. COOPER: I object to this, Your Honor.

THE COURT: Sustained. I don't see why we are going into that.

MR. POWERS: Only a few preliminary ques-

tions.

THE COURT: I find them to be totally collateral and outside the scope of our case.

MR. POWERS: But the format or selling of the company, an earnings presentation was used.

THE COURT: I don't agree with that. That seems highly unlikely even if true. Let's not go into some other case.

Q Mr. Faggen, during the summer of 1968, did you start having discussions with a company called Diebold, John Diebold, Inc.?

A Yes, we did.

Q In the summer of 1968?

A Yes, it would have to be in the summer of 1968.

Q Were you talking to Diebold based on an introduction provided to you by Ben Robinson and Alan Aronson?

A Well, I met the man through Aronson, but neither of us had any idea of a merger or acquisition when we met.

Q The man was introduced to you by Aronson, wasn't he?

A Yes.

Q And the man was a client of Aronson's?

A As far as I knew, a personal client.

Q Rogov. R-O-G-O-V?

A I don't know whether it is Rogov or R-o-g-o-f-f.

Q You had several meetings with this Rogoff over the summer and into the early fall of 1968, didn't you?

A Yes, I had a number of meetings with him.

Q Mr. Faggen, I show you a document which is marked exhibit 1 for identification. I ask you if that document is in your handwriting?

A Yes, this page -- this is my handwriting.

Q And the second and third page also are in your handwriting?

A Yes.

Q And the document annexed to the tax return for the year ending June 30, 1968 of Harold Faggen Associates, Inc., your main corporation?

A I can't say that it is. It looks as if it might be, but the name is blocked out and I don't know.

Q Now, did you provided exhibit 1 for identification to Edmund Kaufman, the negotiator for Titan?

A There are things mixed up here. I don't think they were ever together. I don't know how they got together. I don't know if this is related, this first page is related to the other.

Q You provided pages 2 and 3, the tax returns of Faggen Associates, to Kaufman in or about September

1968?

A Not in this form.

Q What form did you provide it in, Mr. Faggen?

A There was a lot of -- there were lots of notations and books.

Q There were additional pages in it?

A I don't know. there were lots of notations on the backs of these pages.

Q Do you have them in Court, those additional notations?

MR. COOPER: Yes.

MR. POWERS: Could you staple them to this exhibit 1 for identification?

MR. COOPER: No, wait a minute.

MR. POWERS: I would liketo offer exhibit 1 in evidence.

THE COURT: Do you object to this, Mr. Cooper?

MR. COOPER: Your Honor, the witness already said that -- yes, I object to it, your Honor.

THE COURT: Well, I am inclined to agree on this stage of the record, Mr. Powers. The witness is not at all sure he did advance these and I am not at all sure that he knows what these are.

MR. POWERS: I think I can establish the

witness' affidavit in this case, that these are the documents he supplied to Mr. Kaufman.

THE COURT: I will sustain the objection and you will have ample oppurtunity to do anything you can to back this up or whatever he does identify you can offer. I will sustain the objection now for the reasons just indicated.

Q Mr. Faggen, did you transmit pages 2 and 3, a list of adjustments net per the tax return and a copy of a tax return to Edmund Kaufman in or about September 1968 with or without those other papers?

A I did not transmit to Mr. Kaufman these two pages with or without the notations. I did give Mr. Kaufman a copy of a tax return, there were other tax returns as well. I don't know whether this is the one or not because I don't recall all of these things being blocked out. I did not transmit --

Q Did you hand it to him?

A I did not hand it to him. I had copies of pages with notations on the back. I told him that I had been talking to Diebold, I was disgusted that things had broken down and he took my copies and made Xeroxes, I believe, of the copies that I had and probably took them with him.

But I told him, I took back my sheets. I told him at this point they were meaningless, they contained a lot of figures for which I was not responsible and would not agree with. If you calll that transmitting to him, I did not transmit them to him as having any meaning and he knew that.

belt 7 Q Mr. Faggen, my question is limited solely to whether or not you permitted copies to be made of exhibit 1 for identification or did you submit a copy?

A I permitted anyone who wanted to make copies.

Q When Mr. Kaufman left the office, did he take a copy of exhibit 1 for identification, the second and third pages, with him?

A You say the second and third. I had only two pages.

Q Make it convenient for you, Mr. Faggen. Let us take off the cover page. Is that what you gave him?

MR. POWERS: I reoffer that as exhibit 1 for identification.

Could you staple that, please.

THE COURT: As you say, Mr. Powers, you have an affidavit which will have a bearing on this, but wouldn't it be easier to have copies of the tax return?

Apparently for Faggen Associates, or tax returns,

I don't know which. But so that we won't waste any more time on this line, can't we get some agreement from Mr. Cooper?

MR. POWERS: That will be helpful.

MR. COOPER: I will stipulate this, your Honor.

Could I have what was marked for identification on the deposition, pages 1, 2 and 3. However, they were in that exhibit with the notations on the back which the witness says he gave to Mr. Kaufman for Mr. Kaufman to copy. What Mr. Kaufman took, I don't know. But this is what he gave him.

If this is what you want to use, I have no objection to this going into evidence.

MR. POWERS: Fine, no problem. I will change the exhibit, your Honor, and put these two pages on in the form Mr. Cooper would like them and offer them in evidence.

THE COURT: Mark this as a group, 1A and so on for identification. That will be 1A for identification consisting of two pages just produced by Mr. Cooper.

(Plaintiff's exhibit 1A marked for identification.)

MR. POWERS: I would like to offer it in evidence. Is it accepted?

MR. COOPER: Your Honor, I have no objection as to its authenticity but I do have objection going to the relevance to the issues in this case.

THE COURT: Talking about what I suggest we mark as 1A?

MR. COOPER: Yes, your Honor.

THE COURT: Well, gentlemen, if we could only get down to the -- I don't know what you aretalking about because I haven't seen them. Let me look at them so I can rule on your objection.

(Documents handed to Court.)

MR. POWERS: It is a little hard ot read. I have a typed version.

THE COURT: Now, Mr. Cooper, your problem is very simple. Yo uare worried that something will get into the record as being a representation fundamental to the contract or, put it differently, that somehow if we let certain papers in, that they will be regarded as intrinsic or part of the contract which may or may not be the fact.

But I am not going to worry about these items. He says that he gave these to Mr. Kaufman so I will receive these subject to connection and they may not have anything to do with the lawsuit or they may or may not undercut your point at all. But if we are going to object to everything

just on the ground that they aren't controlling to the issues in this case, the Judge is never going to get anywhere because he will never hear anything. I related that there is no jury here and I will receive these subject to connection.

I want to find out a little bit about what this case is about so I can make some sense from here on. It is now a quarter of four and we have done nothing really except to great effort and we aren't even into the issues.

MR. COOPER: Your Honor, one comment on something your Honor said, if I may.

In view of the manner in which Mr. Powers is putting in his evidence, there may be other matters which may be taken subject to connection.

THE COURT: I agree with you.

MR. COOPER: All I want to say, your Honor, these aren't in the pleadings in this case.

THE COURT: I am aware of your position. You made that amply clear but we have no jury here. In an effort to make some heads or tails of what is going on, I am going to admit this tentatively but it may not be binding on your client at all. I understand that.

(Plaintiff's exhibit 1A for identification received in evidence.)

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MR. POWERS: There is a typed version of the figures that appear and I will offer that as 1B.

THE COURT: All right.

MR. COOPER: With the same reservation, your Honor.

THE COURT: Yes.

(Plaintiff's exhibit 1B received in evidence.)

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THE COURT: Anybody given Mr. Faggen a chance to look at those so he can confirm what he already told us?

Q Mr. Faggen, is it correct that you gave exhibit 1A to Edmund Kaufman on September 6, 1968 at a meeting at the Robinson Silverman law office when you and Mr. Kaufman and Mr. Aronson were present?

A It was present during at least part of that meeting because the meeting was one at which I met Mr. Kaufman, he was present at least part, and Mr. Bordon.

Q Another partner in the Robinson firm?

A Yes, I imagine he was, and this is what I showed him, I had discussed with Rogov. When you say I gave this to him, I don't know how to answer that. I did not say -- give it to him for anything that was relevant. I showed him, mainly showing it to Alan Aronson, as a matter of fact, as to some discussion I had with the man he introduced

me to and how they had broken down and that was the end of it.

Q These were the first negotiations with respect to price that you had had, is that right, September 6, 1968?

A There were no pricing negotiations or anything like that at all at the September 6 meeting.

Q That was the first meeting you had with Kaufman, wasn't it?

A Was the first time I met Mr. Kaufman.

Q Kaufman was supposedly the negotiator for the deal for Titan, is that right?

A I was told he would be, yes.

Q He ahd come in from Los Angeles to meet with you and discuss acquisition of your companies, is that right?

A He had come in I had been told, he was coming in if there an acquisition, he was the man who would be handling it on behalf of Titan.

Q Now, Mr. Faggen, in addition to this meeting on September 6, 1968 --

A I have notcompared the two typewritten and handwritten so that I am sure you don't want me to take the time of the Court to do it now.

MR. POWERS: I will give you your copy so you

can compare it.

Q In addition to the meeting on September 6 you only had one other meeting with Kaufman, is that right?

A Total? No, I had --

Q Talking about meetings leading up the the purchase of your companies in or about the fall of 1968? Did you have one meeting on September 6?

A That is correct.

Q Did you have another one October 2?

A That is correct.

Q You didn't have any other meetings with Kaufman, did you?

A I said I had a number of additional meetings with Kaufman, but it was after the --

Q My questions relate only preliminary to the transaction, Mr. Faggen. So you had one or another meeting with him October 2, is that right?

A That is correct.

Q A lengthy meeting in your offices?

A That is correct, attended by three people, Mr. Kaufman, Frank and myself.

Q After that meeting you went over various financial materials on your company, didn't you?

A That is correct.

Q At the conclusion of that meeting you shook hands with MR. Kaufman?

A That is right.

Q And it was agreed at that meeting on October 2, 1968, that subject to the contracts and other materials Titan was going to buy Faggen companies, is that right?

A It was agreed since he represented the control group, that he had the power to deal for them, and at the conclusion of that meeting, the companies were being operated for Titan, subject only to what I think had been labeled Scrivner's work.

Q On October 2 there was a commitment to buy your companies, was there?

A I thought it was more than just a commitment.

Q In fact, it was such a commitment when contracts were finally signed, interest was made payable from October 2 forward, wasn't it?

A That is correct. We agreed that we would work for Titan from that day on.

Q The five-million-five in notes were dated as of October 2 even though the transaction was physically closed on December 2, isn't that right?

A Frankly, I don't recall what the date is.

Q But the notes were dated at October 2?

A I don't recall. Interest was payable from October 2. I really don't recall what the date on the note is.

Q Now, at the conclusion of that meeting you said it was with Mr. Kaufman and Mr. Frank, did you undertake to write up a presentation on your company?

A I undertook to put down the figures that had been gone over with Mr. Kaufman on the basis of four years. He asked that I have five years tax returns ready, but he went through four years and he went through certain groups of figures, made notations, groups of adjustments and I had no notations, but I knew what the items were.

They concerned three or four general categories of adjustments and at hte conclusion he asked me to put those down. He had made his own written notes as he dicated the kind of changes that he wanted.

Q In addition to those figures you were asked to put something down about your list of clients, too, weren't you?

A I made a record of clients. It is really only one small ledger and went through that and he had some idea about putting down ageing clients and he asked that I draw up some kind of -- he and Frank asked that I draw up some kind of tabular form for Frank's information.

Q These were for the records of Titan on acquisition?

A I don't know. He said and Frank said they were for him. I did not know just how he wnated them or what he wanted, but he said get started, Tony Frank is here. He was going back, Kaufman was going back to California but Frank was here, Frank would be the one who wanted them and said you get started and you can be meeting with Frank and he will tell you just how I want them and I agreed to write up what he asked for.

Q Mr. Faggen, I show you exhibit Q for identification. Is that what you wrote up after October 2, 1968 pursuant to those conversations?

A What I remember writing up then is what is exhibit A to this and then when I showed those, those were just figures and when I showed those to Frank, because I continued meeting with him in weeks after that, when I showed them to him he told me just what kind of text he would like to have written up with that and gave me some of his ideas about showing a compound rate of growth and so forth and then I wrote the text.

Q Did Frank tell you you were writing up the text for the Titan board?

A Not at all.

Q You wrote it though, didn't you?

A I wrote this.

Q That is your handwriting?

A That is my handwriting.

MR. POWERS: I offer it in evidence.

THE COURT: Exhibit 2?

MR. POWERS: Yes.

MR. COOPER: What are you calling it?

MR. POWERS: Handwritten sales memorandum corresponding to exhibit A to the complaint and I am going to the typed version next.

MR. COOPER: I object for the reasons I stated earlier and to the characterization by counsel.

THE COURT: It is a handwritten memorandum of Mr.Faggen. What date was this prepared, Mr. Faggen?

THE WITNESS: It was between the Second and as I said, I gave it to Mr. Frank on the 7th of October.

THE COURT: All right. Again plaintiffs exhibit 2 is received subject.

(Plaintiff's exhibit 2 received in evidence.)

Q Mr. Faggen, when you wrote that up in longhand you didn't type it up, did you?

A No, I didn't.

Q You took it to Ben Robinson's office, didn't

you?

A No.

Q What did you do?

A I gave it to Tony Frank.

Q Are you sure you gave it to Tony Frank?

A Sure I gave this to Tony Frank.

Q Was it typed up in Robinson's office?

A I don't know where it was typed up. I don't know of my knowledge where it was typed up.

Q But ultimately it was typed up?

A Yes.

Q Did you read Ben Robinson's deposition in this case?

A Yes.

Q You read in the deposition where he produced the original pen version of that document, do you remember reading that?

A I think so.

Q Do you remember reading where he said that he brought this to me, either by Faggen or Tony Frank or together and we had that typed up in my office? Do you remember that testimony?

A I remember that he said that he had it typed in his office. I don't remember the --

Q I show you exhibit 3 for identification. Is this the typed version of your document?

A This has notations on it. When I met Tony Frank next, on the 9th, he gave me a copy, typed copy, but this is not it.

Q Mr. Faggen, when you say you met Tony Frank on the 9th, that was the date of the Titan board meeting approving the transaction with you, wasn't it?

A I don't know what you mean by approving the transaction. I thought it was concluded on the 2nd.

Q But there was a board meeting at Titan on the 9th?

A There was a board meeting.

Q You went to that meeting?

A I did not go to the meeting.

Q Were you there after the meeting?

A I was invited to come up after the meeting.

Q You met several of the directors?

A That is right.

belt 9 Q They congratulated you on the deal which you were making with Titan and you congratulated them?

A I don't know about congratulations. We met each other and --

Q And you had coffee and visited together?

A Yes, we had coffee and cake as I recall.

Q And you got the typed version of this from Tony Frank, October 9, is that right?

A That is correct. But it had no notations such as you have on it.

Q Incidentally, the notations on page 2, is that Ben Robinson's handwriting?

A I don't know Robinson's handwriting.

Q Where it says on exhibit A excluding investment income, is that Tony Frank's handwriting?

A I don't know Tony Frank's handwriting.

MR. POWERS: I offer it. It is an exhibit to the complaint.

MR. COOPER: I object. This contains matter which was not on the copy he received. If itis being introduced for the purpose solely of showing what the typed material is --

THE COURT: I rather gather that is all that it is being offered for.

MR. COOPER: I am not so sure that is true, your Honor.

THE COURT: I will find out. You are not offering the written matter thereon, are you, Mr. Powers?

MR. POWERS: Yes, the written matter written on

by -- I will establish later. I offer the typed version subject to connecting the written material here at a future point.

THE COURT: On that basis we will receive it, but with no prejudice to offering the matter with an appropriate witness.

(Plaintiff's exhibit 3 for identification received in evidence.)

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Q Mr. Faggen, these first negotiations you had with Titan were held I think you testified in Aronson's office about the Robinson Silverman firm.

A There were no negotiations that day.

Q At the meeting you talked about your companies, didn't you?

A That is correct.

Q The first meeting with Kaufman was at Robinson's offices?

A It was in Mr. Aronson's office.

Q Now, did you tell Mr. Kaufman that Robinson had acted as personal counsel to you in 1968 at that meeting?

A I don't know whether it came up. He knew that because Frank had already told me that he had reported to the control group at the meeting in California and he said

he would go back and forth every week and report all of these things to the group. Mr. Kaufman was there, he had reported the fact that the Robinsons firm and I had worked closely togehter for a number of years nad he had already said that this makes no difference because the Robinson firm would not represent anybody in this matter anyway.

MR. POWERS: I move to strike everything after the statement, no, he did not tell, as not responsive.

THE COURT: All right.

Q Mr. Faggen, did you tell Mr. Kaufman that the Robinson firm was representing you in litigation involving money for which you paid him about $5,000 fee in 1968?

A I don't recall that it ever came up.

Q After your company was bought by Titan, Mr. Robinson's office represented you in a separation agreement, didn't they?

A Yes.

Q And handled your estate planning matters for you, didn't they?

A They drew a will for me.

Q Did you tell Mr. Kaufman you were a partner with the Robinson firm in several real estate ventures in 1967 and 1968?

MR. COOPER: This is all outside the scope of

the pleadings in this case.

THE COURT: Not only that, but I am not sure that I can understand from your point of view, Mr. Powers, why we are going into all this.

We can't even seem to get down to the nitty gritty without taking a fly off into left field.

I don't follow you.

MR. POWERS: At the first meeting on September 6 I am attempting to establish the nondisclosure of the relationship with Robinson and move into the disclosures he made specifically.

THE COURT: I would like to get down at some point to some kind of written agreement, whether there were all disclosures after that and everything else thrown into the hopper, fine. We were rolling along on October 9 and all of a sudden we are back in September 6 and asking whether or not he told him he had been a lawyer for somebody and something else. It just seems to me --

MR. POWERS: My purpose was to show the Court the chronology and focus on the details at each meeting.

THE COURT: That is fine but you left me cold here when you got plaintiff's exhibit 3 received subject. Somewhere along the line there was some kind of formal

document that is apparently forthcoming, at least I assume it was.

MR. POWERS: Yes.

THE COURT: Let us get to that before we ask all these convoluted questions about whether he disclosed this and that and other things in September 6, none of which sounds very earthshaking to me.

MR. POWERS: Your Honor, with due respect, I have to focus on the two key meetings, and now thatI have given the Court an indication that the contract was the subject of a handshake on October 2 and a closing on December 2, I can now go back and --

THE COURT: There was a closing on December 2, 1968?

THE WITNESS: Yes, sir.

THE COURT: That was a formal written contract?

THE WITNESS A formal written contract with exhibits, over 800 pages, sir; two books.

THE COURT: I take it that the lead contract in a sense was the one for the acquisition of Harold Faggen Associates and everything else followed the same format, that is, the other three companies, except as to changes as to the stock.

THE WITNESS: I want to, since it didn't come

out and I certainly don't want anything not to be clear, one of these corporations, the one that had been in existence only about a year, which was the small purchase price, all of the stcok of that was held by a trust which I set up for my son. I just want that to be sure.

THE COURT: I want to get some broad outlines. The contracts essentially didn't differ much and the lead contract was the one for Faggen Associates because that was the one throwing out the most gross income up to that point.

THE WITNESS: That is right.

THE COURT: Now, Mr. Powers, how am I to understand this by going back to --

MR. POWERS: I am going into every detail of the negotiations leading up to it because those written presentations were the cornerstone of the deal. If you feel that is --

THE COURT: Maybe that is right, but now we are going back to September 6.

belt 10 MR. POWERS: But the meeting with Mr. Kaufman --

THE COURT: Are you planning to offer these great contracts?

MR. POWERS: I don't because I am claiming that they were induced by fraud.

THE COURT: All right, you don't want to offer them. On december 2, 1968, very good. Go ahead, sir.

Q Mr. Faggen, taking you back to the meeting of September 6, now, when you showed this memorandum which we marked 1A in evidence to Mr. Kaufman, did you give him any explanation of the adjustments on that memorandum?

MR. COOPER: I object to anydiscussion with respect to any matter which is outside these pleadings. They never mentioned that as a basis for any misrepresentation.

THE COURT: I dont think necessarily that they did, but even if they didn't, that doesnt necessarily control whether this comes in or not. I will allow it. Let us go ahead.

Q Do you understand the question?

A No, sir.

Q Let me rephrase it.

Did you give Kaufman any oral explanation of the adjustments that made up exhibit 1A?

A Are you speaking about the front, back? I don't know.

Q Talking about the first two pages, Mr. Faggen. Let us go through it togehter.

The first phrase there is net per return. Is

that net per tax return?

A We didn't go into any of that. I don't think we spent four minutes on that all told.

Q You didn't give any explanation of those items?

A No, sir, I told you they were drawn in a manner that was a mixture of an accrual and cash that the Diebold representative wanted to make certain presentations. They don't even have the name of the company on them. They are just -- they were things put together and I told them I didn't agree.

Q The documents do refer to a starting entry of $288,494 for your company, don't they, that is for the Faggen Associates?

A For Faggen, yes.

MR. POWERS: Would this be a good time to stop? I know you have a commitment here.

THE COURT: All right. Is that all right, gentlemen?

MR. POWERS: No problem.

THE COURT: Now, as I said, because of my other business tomorrow morning we will start at 11 o'clock, a little later than our normal time in this same room.

(An adjournment was taken to February 20, 1974 at 11 a.m.)

TITAN GROUP, INC.

vs. 72 Civ. 1797

HAROLD FAGGEN

February 20, 1974
10 A.M.

(Trial resumed.)

MR. POWERS: Your Honor, as a preliminary this morning, I would like to offer in evidence--

THE COURT: Before you begin, Mr. Powers.

(Pause.)

I can't give you your precise question, Mr. Powers, but I can say that according to my notes, you have just gone back again to take up the September 6 meeting with Mr. Faggen.

MR. POWERS: One preliminary matter. Your Honor indicated an interest in having the ultimate contract which was closed December 2, 1968, and dated as of October 1, 1968, introduced in evidence, and the form that I have it in, I would like to introduce it in evidence. I don't think my adversary will have any problem with introducing the whole contract in evidence. But the form I have is two bound volumes that Titan obtained from its lawyers, the Robinson, Silverman firm.

So, if we could note on the record that the final agreements of sale are marked as Plaintiff's Exhibit 4 and reserve that place in the record for them, we'll try to figure

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out some way to make Xeroxes or otherwise make them available to the Court as part of the exhibits in the case, including leaving the bound volumes, if that becomes necessary, at the conclusion of the trial.

THE COURT: Let me see if I understand this.

There should be 4 formal contracts, as I understand it.

MR. POWERS: Yes. They are in these two volumes that I have before me.

THE COURT: Why don't you just mark those in evidence? I assume both sides want those in.

MR. COOPER: I do.

THE COURT: Yes. Surely. Mr. Cooper does. And I don't see how the plaintiff can ignore them. But the real problem is that there are no Xerox copies. That would be pretty expensive. Why don't you just mark them in evidence and we'll hold on to them so that they aren't dissipated and we can arrange, if later it becomes necessary, to have copies made of a portion. But let's not worry about that yet.

MR. POWERS: That will work out just fine, your Honor.

THE COURT: Shall we deem them, the two volumes, as Exhibit 4?

MR. POWERS: Yes. And I would like to hold them down here.

THE COURT: Perfectly fine.

MR. COOPER: Judge, if you would like a copy while the testimony is being conducted, I have a copy of them, too, so that you can have them up at the bench if you want them.

THE COURT: Basically, as I understand it, they are really very similar, and the Harold Faggen Associates contract is probably a good example of what they are all about, except for the obvious changes of names and so on.

MR. POWERS: Exactly.

MR. COOPER: That is correct.

THE COURT: If you have got a copy of the Harold Faggen Associates contract, that I would like to borrow, if I could.

MR. LABATON: That is in the appendix, your Honor.

THE COURT: That's right. You are right. No problem. I've got it. I beg your pardon.

MR. COOPER: What you don't have, Judge, are the exhibits to that contract.

THE COURT: Let's not worry about those until they become important, if they do.

And I'll work with the appendix. That's fine.

H A R O L D F A G G E N, resumed.

MR. LABATON: It begins at page 60-A, your Honor.

DIRECT EXAMINATION CONTINUED

BY MR. POWERS:

Q Mr. Faggen, turning back to that conference on September 6 with Mr. Kaufman, you showed Exhibit 1-A to Mr. Kaufman and to Alan Aronson because Aronson knew Rogov and had introduced you to Rogov, is that right?

A That is right.

Q And you didn't have any discussion as to the adjustments which were contained in Exhibit 1-A, did you?

A I don't recall specific discussions. Mr. Kaufman looked at it. We did mention the fact that there were some accrual--attempted accrual adjustments imposed on a cash statement. I told him--I put down on there whatever they wanted. I didn't agree with them. He said, "I don't, either." And that was about the length of the discussion.

Q I see. Mr. Faggen, do you remember being asked the following question on page 185 of your deposition?

"Q Now, did you discuss these adjustments with Kaufman again at your meeting on October 2?

"A We never discussed them.

"Q You never explained anything in those adjustments to Kaufman?

"A On this?

"Q Yes.

"A No.

"Q You never gave any explanation on any of these items?

"A I don't recall doing any more than running through what we had discussed earlier, the various figures, and that is behind us. Now what can we do?

"Q I understand."

Q Do you remember that testimony, Mr. Faggen?

A I don't recall it verbatim. I remember that there were some questions. I don't recall the words.

Q Now, Mr. Faggen, that memo, Exhibit 1-A, was written up in your handwriting, wasn't it?

A Yes.

Q And it was written up two days before the meeting you had with Kaufman, wasn't it?

A No.

Q When was it written up?

A The material on the back, on the backs of the sheets, as I recall, were written 2 days before, when I had lunch with Mr. Rogov.

Q That was on September 4, that luncheon, right?

A Yes.

Q And that was in Peacock Alley at the Waldorf Astoria, right?

A Yes.

you about 1-A. What I really don't understand is what is this last question of yours getting at.

MR. POWERS: The last question is to now go through the accounting analysis which went into 1-A to show how Mr. Faggen developed this accounting analysis and how Mr. Faggen himself had very severe reservations as to the propriety or logic in accordance with generally accepted accounting principles, to establish that through a series of admissions Mr. Faggen has previously made that I am going to go through with him, and to show that, notwithstanding his own disdain for the document and his own feeling that it was inaccurate and misleading, he gave it to Mr. Kaufman without explanation and without saying it was misleading.

THE COURT: Well, this sounds like an argument more than anything else. But, be that as it may, why don't you rephrase thequestion? Because I don't blame Mr. Cooper. I just don't get the scope or significance of your last posed question, and it is probably a very simple matter. Just rephrase it.

THE WITNESS: Your Honor, at this point may I ask for a glass of water again, as I did yesterday? I am terribly sorry.

THE COURT: Surely.

THE WITNESS: I have a throat irritation problem.

Q And when did you write the other figures down on Exhibit 1-A?

A They were written during the course of several meetings that I had with him. I had given him tax information. He had gone back to his office, he had come back to meetings with me, and we compiled them in the manner that he thought he would like them.

Q And those compilations took place in the couple of weeks preceding September 4th, when you did those writings on the back of Exhibit 1-A, is that right?

MR. COOPER: I am going to object to any question dealing with memoranda not part of the pleadings in this case, having nothing whatever to do with the issues. This was something prepared for a totally different transaction.

THE COURT: If it was, I don't quite follow this. Perhaps it is because I really don't understand Mr. Powers' question.

MR. POWERS: Can I make it clear, your Honor? This document, 1-A, which was given to Mr. Kaufman on the first negotiating session with Mr. Faggen adjusts the income of the Faggen Companies upward from beginning at 288,494, for the main company, all the way up to 571,000 pre-tax. It was the basic negotiating document between the parties.

THE COURT: Whatever it was, I'm not quarreling with

(Pause.)

BY MR. POWERS:

Q What was the substance of the deal you were negotiating or discussing with Mr. Rogov at that series of meetings?

MR. COOPER: I'll object to that, your Honor.

THE COURT: This to me seems to be totally unrelated to even your argument, and I am going to sustain that objection because any conversations with one Rogov I don't think have anything to do with their case, or even taking your stated argument, I don't understand it.

If you want to ask Mr. Faggen about his own work on those figures, fine. But all these talks with somebody named Rogov, quite properly in my judgment, are objectionable, and I don't see that they are necessary. That's what baffles me.

MR. POWERS: All right, your Honor.

Q Now, Mr. Faggen, you marked up this list of adjustments in 1-A in the presence of Rogov, didn't you?

MR. COOPER: I am going to object to that, your Honor.

THE COURT: Again, Mr. Powers, I don't like to quarrel with you, but from the point of one who is supposed to be the trier of the facts, I have to say that this is the most confusing way of going about it.

A moment ago you argued you wanted to show that these

figures were marked up, and I don't recall so even by the admission of Mr. Faggen.

MR. POWERS: Right.

THE COURT: Why do we have to get into whatever he did with Rogov? I don't understand it, particularly from your viewpoint.

There is a way of doing this that can avoid this problem so simply that even I can think of.

Mr. Cooper, I think, is on firm ground. We don't want to be trying a dispute outside of the purview of this case. We have enough trouble sticking within our case itself.

I have no objection to you asking Mr. Faggen whatever he did in preparation of this document or who helped him and so on. But why you inject Rogov into it--

MR. POWERS: I appreciate the Court's guidance.

BY MR. POWERS:

Q Mr. Faggen, what did you do in connection with writing up Exhibit 1-A?

A I supplied the tax returns and answered some questions that Rogov had on items and put down what he wanted to put down in the manner in which he wanted to put down. As you can see, they are very roughly prepared.

THE COURT: Who is Rogov, or who was he, at this point? I'm really confused here.

THE WITNESS: Sir, Rogov was the gentleman who had been represented by Mr. Aronson in his employment contract, as I understood it, by the Diebold Corporation. He was represented to me as a computer expert and he was introduced to me because of the fact that he was doing work in setting up a computer division within Diebold.

THE COURT: So this came about when? Earlier in the year 1968 when you had some brief conversations with the Diebold organization?

THE WITNESS: With Mr. Rogov only?

THE COURT: Rogov, as you understood it, did he purport to represent Diebold?

THE WITNESS: Yes, sir.

THE COURT: He did. And it was at that time, pursuant to some questions that Mr. Rogov raised in his capacity as an agent for Diebold, that you prepared 1-A.

THE WITNESS: That he and I prepared. We put it together in a manner in which he wanted it because he, while we were discussing computers, got the idea that the Diebold organization may want to acquire our organization and expand into actuarial computer work.

THE COURT: I see. Now, did you tell Mr. Kaufman, when you turned over these documents known as 1-A, that you and Diebold had more or less put this thing together?

THE WITNESS: Yes, sir.

THE COURT: You did. And did you tell Kaufman who Diebold was?

THE WITNESS: Rogov, not Diebold.

THE COURT: I mean Rogov. I beg your pardon.

THE WITNESS: Yes, sir. Because we were with Mr. Aronson, who had arranged the meeting originally. He knew that he was a representative or an employee or an executive at that point, I really don't know which, of the Diebold organization, and I had brought it along, really, to tell Mr. Aronson that I was finished talking to the man he had introduced me to.

THE COURT: All right.

BY MR. POWERS:

Q And you had finished talking to him just 2 days before the meeting with Maufman and Aronson, is that right?

A That's right.

Q Okay. Now, Exhibit 1-A is a presentation of adjusted total income for '68 after a series of adjustments, isn't that right?

A I wouldn't call it that.

Q Well, don't you recall testifying on page 63 of your deposition:

"Q It is adjusted total income, isn't it, for 1968?

"A It is adjusted after a series of adjustments,

not adjusted total income for 1968. There are a series of adjustments which were made for him and they exclude investment income for purposes of this. It would show the income for the year as being well over $600,000."

Didn't you say that at your deposition?

A I did. But I think that answer says specifically I cannot regard it as income. I regarded them as a series of adjustments which he wanted.

Q Now, it shows a total of $571,000 and it is a total figure which excludes investment income, isn't that right?

A May I see it?

Q If you want to hold that while we talk, Mr. Faggen, that's all right. (Handing.)

MR. COOPER: What page are you reading from?

MR. POWERS: 63.

Q Now, Mr. Faggen, doesn't that go through each of your corporations--

A Would you repeat the question? I didn't answer the last question.

Q Well, I'll rephrase it just to save time rereading it.

Doesn't that Exhibit 1-A go through each of your 4 corporations and exclude investment income from the totals?

A I see an item of "deduct investment income" on each.

But I don't think that says total income on here, at any point.

Q Do you see a final figure at the bottom of the second page that says $571,000?

A Yes.

Q You see that final figure, don't you?

A I see a figure $571,000.

Q And you wrote that figure down on 1-A, didn't you?

A Yes, I did.

Q And you added up the net figures in all of the other columns to get the $571,000, didn't you?

A I don't recall adding them up. They must have been added. I haven't even checked the totals. But that is not called total income at any point.

MR. COOPER: Excuse me. What was the total figure on that?

MR. POWERS: 571,000.

THE WITNESS: $571,476. There is a final figure. It is not labeled total income. It couldn't be labeled total income.

Q Do you think it is anything other than a total of all the figures that are listed on that document that you wrote in your handwriting?

A I don't think it is anything other than the total of all the figures.

Q Mr. Faggen, the purpose of those adjustments was to make the earnings of the Faggen Companies as high as possible in '68, isn't that right?

MR. COOPER: If your Honor please, I am going to object to this line of questioning on this document in connection with negotiations with a third party. It is not part of the issues in this case. It is not even alleged as the representation on which they allegedly relied. It is not a part of this complaint. I object to it, your Honor.

THE COURT: Well, first of all, it may well be that. Certainly, as I understand it, this is not what I gleaned from the papers was a document or documents on which the plaintiff claims that it relied in making these acquisitions. Isn't that so, Mr. Powers?

MR. POWERS: Not quite so, sir. Your Honor, we relied on a final memorandum, which is Exhibit 3 in evidence now, and the figure for 1968 shown in Exhibit 3 is $571,000. It was reached by a series of adjustments and the adjustments, which were conveyed to us, were those in Exhibit 1-A, and I intend to show through other witnesses that the adjustments that we are going through now were the supporting back-up for the total figure of $571,000, which ultimately went to the board of directors of Titan. That is why there is some significance, to see what the thinking was behind each of these

adjustments, because Mr. Faggen did not supply any of that thinking either in writing or orally other than this list of adjustments, which he wrote in his own handwriting, and gave us 2 days after he completed them with Diebold.

THE COURT: Well, I'm willing to give you a little latitude, but, my heavens, I don't know why you just don't get at it. If you claim that these are the same figures that appeared in 3, fine; I don't know why you just don't ask him that.

MR. POWERS: I think it is very important to show Mr. Faggen's attitude toward these adjustments, unconveyed to Mr. Kaufman. That is the purpose of developing this line of inquiry.

THE COURT: I would be willing to give you latitude if I could just understand that you were really doing that. But the questions all seem to tail off in other directions.

But, in any event, I'll overrule the objection with the understanding that you'll get to the heart of this and we'll move on, because I really think, from your own point of view, it is not very persuasive the way you are doing it.

MR. COOPER: If your Honor please, might I interject at this point one other point?

Counsel keeps referring to a rounded number of 571 as the number. I just want to point out to your Honor

that the document which is annexed to the complaint has a number of 571,262. The document which is Diebold is 571,476.

THE COURT: Right. We can get to all that in due course. But let's let Mr. Powers have his head along the lines I'm trying to suggest here, and if he misstates a figure and rounds it off, I don't think anybody is going to be harmed.

Go ahead, Mr. Powers.

BY MR. POWERS:

Q To repeat my last question to you, sir, the purpose of those adjustments in 1-A was to make the earnings of the Faggen Companies as high as possible in '68, is that correct?

A I don't know the purpose. You would have to ask Mr. Rogov.

Q Mr. Faggen, at page 65 of your deposition, when asked the identical question, you said, "For his purpose."

Mr. Faggen, do you also remember being asked this question:

"Q For his purpose. But his purpose and your purpose in going through the adjustments with him was to make the earnings of the Faggen Companies appear as high as possible for '68.

"A I didn't agree with him, with many adjustments.

"Q They weren't your adjustments?

"A A lot of them were his ideas."

Was that a truthful statement at your deposition?

MR. COOPER: Just a moment. Your Honor, that is totally consistent with what the witness previously answered.

THE COURT: I'll decide that, Mr. Cooper. Don't forget that.

MR. COOPER: Okay.

THE COURT: He is merely cross examining this witness. Don't be surprised by that development. We knew that was coming when he called him yesterday.

Now, let's get to it.

MR. POWERS: Thank you.

THE COURT: Your question is, having read his testimony previous, what?

Q Was that a truthful statement at your deposition?

A Certainly.

Q You didn't agree with the adjustments in many cases?

A That's correct.

Q Would it be fair to say that every item in the adjustments were his idea and not your idea?

A I don't know how to answer that question, every item in the adjustments were his idea and not mine.

Q Tell me, which ones were yours and which ones were his,

Mr. Faggen?

A I can't say that I remember after this period of time just which of these many figures were his. I know items of pension prepayment, there was no question, there was agreement. The pension fund had been overfunded and, had the company been owned by a publicly-held company and they would have wanted to maximize profits, minimize pension contributions, the contribution wouldn't have been made. There was no question about that.

And he had to ask me what was the status of the pension fund.

Is that what you mean? I don't understand the question.

Q Well, you and Mr. Rogov were trying to get to a set of earnings which showed about $600,000 by 1969, weren't you?

A No, I wasn't trying--

MR. COOPER: I object to the form of that question.

THE COURT: Well, I'm going to sustain that as to form. Again, Mr. Powers, you baffle me. Why put it that way?

Q Mr. Faggen, you wrote on the back of this a set of three years' earnings going out, didn't you, in one of these cover pages that you said you wrote on in pen? Do you recall saying that, Mr. Faggen?

A May I see that?

Q Here it is, Mr. Faggen. On the back here, Mr. Faggen, isn't this your handwriting, where it says, "3 years out, 1969, 600,000"? Isn't that your handwriting on the back of 1-A?

A Some of this writing is mine, some of it is Rogov's. It was, as I said, passed back and forth across a table at luncheon. I really don't know whether that "three years out"--whether I recognize that completely as mine or his.

Q But you were talking about starting '69 with $600,000, weren't you, in income?

A He was.

Q Thank you, Mr. Faggen.

A He was talking 600 to 700,000 for '69.

Q For all of '69, that's right.

Now, his idea included taking, as an addition to income, salary that you had prepaid to several of your employees, didn't it?

A Yes. That was his theory of accrual, deferring those expenses as not being applicable to fiscal years ended in 1968.

Q You didn't agree with that, did you?

A No.

Q He just dreamed up those things, didn't he?

A Dreamed them up?

Q Yes.

A I don't know what you mean.

Q They didn't have any accounting validity, did they?

A If you were preparing a cash basis statement, I would think not.

Q And they wouldn't have any validity to demonstrate to a reader what the continuing cost of employees would be, would they, if you were just taking it as a prepaid item and adding it to income for one year?

MR. COOPER: I object to the question, your Honor.

THE COURT: It seems to me what you are saying is you really can't answer this, isn't that it, Mr. Faggen?

THE WITNESS: That is exactly it.

THE COURT: I will accept that.

THE WITNESS: You will have to get Mr. Rogov.

THE COURT: Let's turn to something else.

BY MR. POWERS:

Q Was the basic deal with Rogov a payment of $2-1/2 million in cash for a third of your company, and then a pooling of your company into a new entity to be owned two-thirds by Diebold with a public offering to be made from it at some future point?

MR. COOPER: I am going to object.

THE COURT: Sustained. Look, Mr. Powers, I don't mind your asking how this 1-A was prepared to the extent the witness can tell us what his views about it are. But we are

not interested here in litigating a potential deal that never came off with Diebold. That is not our purpose, and it certainly is not Titan's purpose and it does Titan no good whatsoever.

Q Did you reach a point in your discussions with Rogov when he said that you would be starting '69 with 600,000 and maybe have 600,000 by the end of the year, when you said, "Stop it. Forget it."?

MR. COOPER: If your Honor please, I am going to object.

THE COURT: Sustained. Again, Mr. Powers, I tried to tell you the line to be followed. I have no objection to your trying to establish, if you can, what portion of 1-A came from the mind or creation of Mr. Rogov. But what the conversations with Rogov, apparently acting for Diebold, were are of no consequence, particularly from the plaintiff's point of view, and I don't intend to waste my time dilating on this any more.

MR. POWERS: Thank you, your Honor.

Q Had you ever treated the prepayment of salary in your Companies in the way it is treated on 1-A before you had the discussion with Rogov?

A We conducted our business on a cash basis.

Q And it was never a procedure you used in any computa-

tions within your business, was it?

A Not one that I was aware of. I did not do the computations for my business. You would have to ask my accountants. But I was not aware--

Q Aren't you an accountant?

A I am an accountant, but I do not keep the books or do the accounting work for the business.

Q In 2 places in these adjustments written in your handwriting, we have salary adjustments, don't we? One is on the 4th full line of Exhibit 1-A, a $25,700 salary adjustment, and then there is a salary adjustment which you say you never used in your business, which comprises the last 3 lines on the first page of 1-A, doesn't it?

You have it in front of you, don't you, Mr. Faggen?

A You are back again on the Rogov-Diebold statements. I thought we were not pursuing that. I don't know how to answer this, your Honor. Do you want the question answered?

THE COURT: Well, as I understand it, there is no objection to this by counsel.

MR. COOPER: Your Honor, I have objected to this entire line. I thought Mr. Powers was going to address himself to the specific items that had been prepared by Mr. Faggen, as to which your Honor said you would permit him to inquire.

THE COURT: Well, this also encompasses, within tolerable limits, anything on this piece of paper that he can tell us that Rogov did. But I despair, gentlemen. This seems to me to make this lawsuit even more questionable.

MR. POWERS: I am almost through with this line of inquiry, but I have to work with these detailed items because I sincerely believe they are very important to the trier of the fact, ultimately. I am trying this case with my adversary as my first witness, so naturally the testimony comes out a wee bit disjointed.

MR. COOPER: If your Honor please, I can't hear counsel back here.

THE COURT: Gentlemen, I can't hear either one of you because it is getting a little tiresome. You did not object to this last question, Mr. Cooper, and I don't think that's very fair to me. I assumed you had no objection to it. True, I have spoken my piece several times. But if you don't object, I assume you agree.

MR. COOPER: I do object to it, your Honor.

THE COURT: Well, it is a little late.

Now, put it again. I've even lost sight of the question, with these petty arguments.

BY MR. POWERS:

Q Mr. Faggen, you testified that the salary adjustments

based on taking credit to income because you prepaid some salary during the year were not something you did in your business, is that right?

A That is correct.

Q Yet, don't you have these salary adjustments on at least 4 places on Exhibit 1-A in your handwriting?

A I told you they were made by Diebold.

Q Now--

A By Rogov.

Q Didn't you actually question the validity of the whole presentation of $571,000 of these adjustments?

MR. COOPER: I'll object to that, if your Honor please.

THE COURT: Well, I don't mind asking about that at the time when he presented this material to Mr. Kaufman.

MR. POWERS: It is within 2 days after completion of this term, your Honor.

THE COURT: I am not arguing with you, Mr. Powers. Do you see the point I am trying to make? This isn't a lawsuit. This is some kind of an obstacle course you are running here. I am getting a little tired of it.

Either you accept what I'm trying to help you out with or else we are going to shut down on you. I don't want to listen to this any longer. This is unprofessional. I

certainly don't object to your asking whether or not there was any reservation in his mind about any of these figures at the time when he presented them to Kaufman. I don't care if it was 2 days or 200 days after Diebold.

MR. POWERS: Thank you.

THE COURT: I want to ignore that. There is no profit to you at all in any other way, and I just think you are making an absurdity out of this.

Now, the question, Mr. Faggen, is simply this:

At the time when you had your conference with Mr. Kaufman on the 6th of September, did you express any reservation to Kaufman about any of these adjustments?

THE WITNESS: I told him, sir, they were ridiculous and that I was--

THE COURT: In so many words?

THE WITNESS: In so many words. I was disgusted with Rogov even wanting to make them, and there is no question about this, sir. In his notes of that meeting, he stated that I expressed disgust.

THE COURT: Well, now, did you delineate in what respects you were disgusted with these figures or adjustments?

THE WITNESS: Sir, I told him what Rogov was trying to present was something that on the basis of Harold Faggen Associates, Inc., and these were later companies, a few years

out, he could bring a $50 million stock issue, and I said this is sheer foolishness. That was what the whole thing led up to, those notes on the back.

THE COURT: I see.

Next question.

BY MR. POWERS:

Q Mr. Faggen, did you question the validity of adding to income for special work in process on Exhibit 1-A? There are 2 items on it. One is for $25,000 and one is for $3,500.

MR. COOPER: Objection, your Honor. I thought your Honor had told--

MR. POWERS: Let me rephrase the question, your Honor.

THE COURT: Please do.

Q Did you state to Kaufman the addition of 25,000 and 3,500 of an add-on to income for '68 to special work in process was ridiculous and wasn't in accordance with generally accepted accounting principles? Did you tell that to Kaufman?

A I don't recall discussing that.

Q And did you tell to Kaufman that you knew exactly that you had 32,800 in expense items that will not recur that are listed on 1-A, but you doubted their validity? Did you tell that to Kaufman?

A I did not discuss it and I didn't say that I doubted

their validity. You just asked that.

Q You doubted the validity of the whole 1-A, didn't you?

A I never said I doubted the validity of every figure on there.

Q Mr. Faggen, I call your attention to page 90 of your deposition:

"Q Did you actually question the validity of this 581,000 total that you got to on these adjustments?

"A Did I question the validity?

"Q Yes.

"A I supplied one figure in all for this. I supplied one meaningful figure, in my opinion, which he didn't have, and some of these components we worked on together, and that is the item again--may I have..."

--I can't read this one. I can't read this.

Question later on in the page:

"Q You didn't concur in what he thought he was going to show in 1969 from your business. Is it equally true that you didn't concur in what he was showing on an adjusted basis for '68 on your businesses?

"A I didn't concur in the way he was setting up these deferrals."

MR. COOPER: Your Honor, I don't know if there is a pending question. There is a pending narrative.

Q Did you hear those questions and give those answers at your deposition, Mr. Faggen?

A I presume so.

Q At the conclusion of your meeting with Rogov, you told him to forget about that deal, didn't you?

MR. COOPER: Objected to, if your Honor please.

THE COURT: Mr. Powers, I am going to sustain that because we know there is no dispute but that there was no deal with Diebold. We wouldn't be here today if there were one. You know it, Mr. Cooper knows it, I know it. Stay out of it. It is of no consequence or help to you.

Q Now, when you prepared Exhibit 2, which was a hand-written memorandum describing your company and describing adjusted income for 4 years, did you make any written notes in support of those income adjustments?

A May I see what we are talking about?

Q Yes, Mr. Faggen. I call your attention to the adjusted income figures, which are Exhibit A. They are the 5th page of Exhibit 2. (Handing.)

A Now, would you ask the question?

Q Did you make up any written back-up material on how you reached those adjustments that went into Exhibit A, which is a part of Exhibit 2?

A I must have had an adding machine tape or scratch

paper on which the various items were added.

Q You didn't supply any to Kaufman, did you?

A Kaufman made his own notes.

Q And you didn't supply any to Frank or Robinson, did you?

A No.

Q And you didn't supply any back-up material to Titan's board, did you?

MR. COOPER: I'll object to that, if your Honor please.

THE COURT: I'll have to have that read back, again. I don't follow it. You didn't supply what?

MR. POWERS: Any back-up material on those adjusted earnings figures to Titan's board.

THE COURT: Now we are jumping away from September 6th to some later time.

MR. POWERS: The point, your Honor, is that the only set of adjustments in writing we have is 1-A.

THE COURT: No. That may be, but that's not it. I am not trying to argue the merits with you, Mr. Powers. I am just trying to put this in focus.

Are you asking whether at some later time after September 6th some sort of back-up figures were submitted to Kaufman and/or the then board of Titan?

MR. POWERS: Exactly, your Honor. That's exactly my question.

THE COURT: Do you follow that, Mr. Faggen, what he is trying to ask?

THE WITNESS: I think so. But I never submitted anything to the Titan board.

THE COURT: All right. That is your answer.

Q So that the only adjustments in the possession of Titan, the only adjustments in the possession of Titan, were for one year 1968, and they are contained in Exhibit 1-A, is that right?

A No, sir.

MR. COOPER: Just a moment.

If your Honor please, so far the only ones that we have that this was ever delivered to--as a matter of fact, the testimony yesterday was that it was given to Mr. Frank. Mr. Powers has interjected that this was given to Titan.

MR. POWERS: Mr. Frank was president of Titan at the time.

THE COURT: I swear, you fellows want to make this so hard for yourselves, it is just incredible. I am beginning to understand a little better the history of this great litigation before Judge Ryan in this Court and before the Court of Appeals. It is all beginning to come into a little

bit better focus, which is not very helpful to anybody to think about.

Now, let's go back, Mr. Powers. We are not here to obfuscate or confuse, particularly from his client's point of view. You are going to have to rephrase that because you are baffling the witness and me, and you are raising the hackles of your adversary, again to no avail that I can see for you at all.

Q Mr. Faggen, isn't it a fact that you did not give any written adjustment figures in support of the totals contained in Exhibit 2 to anyone employed by Titan or acting as counsel for Titan, other than the adjustment figures contained in Exhibit 1-A?

MR. COOPER: May I have that question read, your Honor?

THE COURT: Yes.

(Question read.)

MR. COOPER: I'll object to the form of that question, your Honor.

THE COURT: Well, I am going to allow it if Mr. Faggen understands it.

Do you understand it, Mr. Faggen?

THE WITNESS: The problem--I can't answer the question.

THE COURT: All right. I'll accept that.

THE WITNESS: I can't answer the question because I didn't give 1-A as back-up to anything. I had on October 2nd given Mr. Kaufman all the back-up, and he had it.

THE COURT: I understand. Let me see if I follow this.

Later on, after September 6th, and on October 2nd, you gave certain other figures to Mr. Edward Kaufman.

THE WITNESS: We went over the adjustments and he, with Mr. Kaufman and Mr. Frank, noted the point, because when we went over '68, I know they reached a point at which Mr. Frank said, "Well, gentlemen, that is over the 500,000 we have been talking about." And there wasn't any particular interest.

THE COURT: What documentation were you working with on that day?

THE WITNESS: We were working with 5 years of tax returns, and we went over 4 years and picked the items off of the returns, sir.

THE COURT: I see. You didn't have, I gather, the financials which are reflected in paragraph 3 of the subsequent contract of sale.

THE WITNESS: The only figures--

THE COURT: The 3 months' figures.

THE WITNESS: Oh, those were--

THE COURT: They came later.

THE WITNESS: I believe they have been referred to as stub period--I am not familiar with the language--stub period financials prepared by Warren. Is that what you are talking about?

THE COURT: Yes.

THE WITNESS: They were done later at Titan's direction

THE COURT: They were for the 3 months ended on September 30, 1968. But you didn't have those, of course, on October 2?

THE WITNESS: No.

THE COURT: So, as you say, it was really the tax returns for the previous five years.

THE WITNESS: Yes, sir.

THE COURT: On which you, Frank, Kaufman and who else were working?

THE WITNESS: Just the five of us were there on t... day.

THE COURT: All right. Next question.

Q Mr. Faggen, did you make any written disclosure to Titan that you were a partner with several partners in the Robinson law firm in real estate ventures, at the time the Robinson law firm was representing Titan in this transaction?

MR. COOPER: I'll object to that. It is not an issue in this case.

THE COURT: Well, I'm not going to sustain the objection, to question the thrust. But I must say this confuses me.

You are asking him whether he was a member of the Robinson law firm?

MR. POWERS: No, sir. I am asking him whether he made a disclosure to Titan's lawyers at the time of the transaction that he had brought Mr. Faggen in as partners in a series of real estate ventures, in which he was a limited partner along with other partners in the Robinson firm, a series of business relationships of a personal nature between him and partners in the law firm. That's what I'm asking him about.

THE COURT: Perhaps you can help us. Instead of just saying Titan, whom do you have in mind? We have only heard about certain persons purporting to act for Titan with whom he dealt.

MR. POWERS: Mr. Robinson was the chairman of the board of Titan.

THE COURT: I understand that. But I still think your question is so broad--

MR. POWERS: Let me rephrase it. Maybe I can break it into two or three questions and make it a little clearer.

THE COURT: I would hope so.

MR. POWERS: Thank you, sir.

Q Mr. Faggen, you were friends with Mr. Robinson for many years before 1968, before you went into this contract, weren't you?

A Yes.

Q And Ben Robinson's law firm handled the legal work on this matter where your company was acquired by Titan and Ben Robinson's law firm represented Titan, didn't they?

A As I said before, the only one dealing with me who represented Titan in this--the only ones were, from a legal standpoint, Mr. Kaufman, negotiating and legal, and to a certain extent Mr. Frank, and we came to an agreement on October 2nd as to the deal we had agreed that--and, incidentally, Mr. Kaufman told me, because I didn't know what is involved in drawing merger agreements, if anyone had suggested we would end up with books like these, I would have laughed at him at the time--that there would be a great deal of work for lawyers, that there are many contract clause negotiations that will go on, that he would be representing Titan in all of these, that I would have to get counsel to represent me.

Q You knew that--

A We had a couple of items, such as the question of my wanting more stock convertible at a lower figure, but we agreed these would never be breaking points, all of the legal

draftsmanship and the negotiations of clause by clause, and he told me that it would take several months to complete.

He did mention the fact that he would be having the Robinson firm acting on certain things for him, but that he would--he was the attorney for this matter. He made that very clear.

Q Mr. Faggen, you knew that the Robinson law firm drew the contract and negotiated with your Simon Scheib, didn't you?

A No. They told me absolutely not. They have always said they couldn't do anything as far as I was concerned. Simon Scheib always said everything takes time because it all has to go to Kaufman.

Q You knew that the Robinson law firm was general counsel to Titan in '68, didn't you?

A I was informed of that. Because Mr. Kaufman represented the control group, it was just understood that his firm were general counsel.

Q You were at the closing of your transaction, weren't you? You went to that closing?

A Certainly.

Q Taking a look at Exhibit 4, Mr. Faggen, document No. 18 in the volume, which is a letter from the Robinson, Silverman firm to you. Do you remember getting that letter, where it says, "Dear Sir," addressing it to you care of your

lawyer, "We have acted as general counsel to Titan Group in connection with the transactions set forth in an agreement."

Do you remember getting that letter?

A No. I just remember that all of those matters were taken care of by my counsel.

Q And do you remember Titan paying $17,500 in legal fees to the Robinson law firm for handling the acquisition of your companies?

MR. COOPER: I'll object to the form. I don't know how this witness could remember what Titan paid attorneys through its counsel.

Q Did you know that at the time? Let me rephrase it.

Did you know what fees Titan paid to its general counsel for acquiring your companies?

MR. COOPER: Your Honor, this is so irrelevant. I hesitate to keep burdening you with objections, your Honor, but I think it is way outside the pleadings.

THE COURT: We have already expended a lot of time here, so let's finish this.

Forget the amount. That is inconsequential. Did you at the time have any knowledge that Titan was paying a retainer or fees to the Robinson firm in connection with the purchase by Titan of these 4 companies of yours?

A In connection with the drawing of the agreements, I

must have, they must have been paying them. I certainly would have been stupid to assume they were working for nothing.

THE COURT: Right. And it was also your understanding, however, at the time that Mr. Kaufman, his firm --

THE WITNESS: Yes, sir.

THE COURT: -- was also representing Titan?

THE WITNESS: Mr. Kaufman's firm was counsel for Titan. This is what I was told, that the Robinson firm was handling locally.

BY MR. POWERS:

Q Now, Mr. Faggen, did you ever make any statement in writing to anyone working for Titan which stated in substance and disclosed that you were a limited partner in several real estate ventures with partners in the Robinson, Silverman firm?

MR. COOPER: I'll object to that, your Honor.

THE COURT: I must say, I don't understand it.

MR. POWERS: A series of concealed conflicts of interest which led Titan to put responsibility for handling the contract here on a virtual business partner of Mr. Faggen's and which --

THE COURT: And that is a 10b-5 claim?

MR. POWERS: No, sir, your Honor. But it is one of the elements here that goes into the background of these

contracts and the way they are drawn. I have several other such conflict facts I would like to get admissions on, and I am through with this witness.

THE COURT: I must say, it strikes me as being a very improvident line for Titan to follow. But, in any event, I will allow, subject to conenction, a question which is designed to get at the kernel of the matter without all this waffling around. This is it. I am not going to brook any more delays here. We haven't got anywhere in this case.

MR. POWERS: We are almost through with this witness.

THE COURT: Let me ask you, Mr. Faggen, did you ever have any occasion to either orally or in writing tell any officer or director or agent of this Titan firm that you had been involved as a limited or general partner in any real estate deals with any member of the Robinson law firm?

THE WITNESS: Sir, it never occurred to me to discuss --

THE COURT: I am not blaming you, sir.. I am not trying to draw any invidious inferences. I just simply want to know, did you ever have occasion to represent or discuss orally or in writing the fact, if it was a fact, that you were in some real estate deals with some members of the Robinson firm?

THE WITNESS: May I elaborate a moment?

THE COURT: Just tell me, what is the answer?

THE WITNESS: The answer is that it never occurred to me to say I have. I might have, I have forgotten, some five or six or seven thousand dollars invested in a few limited partnerships that they had.

THE COURT: When you say "they," what do you mean?

THE WITNESS: That the members of the Robinson firm might have had some interest in as well.

THE COURT: Fine. So you never have.

THE WITNESS: The point that I -- it had not occurred to me to mention that. But the point that had been mentioned, sir, to Mr. Frank, and I'm almost positive to Mr. Kaufman, but I am not positive to Mr. Frank --

THE COURT: Who mentioned it to Mr. Frank?

THE WITNESS: I.

THE COURT: You did?

THE WITNESS: That I had been working with the Robinson firm, that they had represented me in some things, that we had a long-time close relationship. And Mr. Frank told me, and he has since affirmed it, he reported that back to the control group in California. So that Mr. Kaufman had to know it, sir.

MR. POWERS: I move to strike that relating of conversations, what Frank told him.

THE COURT: I am not sure I follow that. What is it you want stricken?

MR. POWERS: His relating what Frank told him, Frank told to Kaufman.

THE COURT: Well, he has made it clear he assumes. Surely, I am not so foolish as to ignore that, Mr. Powers.

MR. POWERS: Thank you.

Q Mr. Faggen, did you tell anyone connected with Titan in '68 that you had introduced the Robinson law firm as counsel to the Furniture Workers Pension and Welfare Plans, which were clients of your companies?

MR. COOPER: Objection, your Honor.

MR. POWERS: The same question, oral or written disclosure.

THE COURT: I don't get the significance of this at all. This seems to come out of left field. I can understand the law firm bit, but--

MR. POWERS: If I could tell you where I am going--

THE COURT: Do you want him to tell us whether or not he ever disclosed, orally or in writing, some representation of some welfare fund?

MR. POWERS: It is more than that, your Honor. It is the referring of a $50,000 a year group of retainer clients to the Robinson law firm in or about May of '68, just prior to

the onset of the negotiations with Titan, which resulted in a lucrative lawyer-client relationship for the Robinson law firm.

THE COURT: If you would skip the hyperbole, we could get down to this. I know you decided this case already, Mr. Powers, but it would help if you didn't formulate every question in that manner.

Let me see if I get that. You want to ask him, first of all, why.

Mr. Faggen, did you refer some pension and welfare client to the Robinson firm in May of 1968, that you can recall?

THE WITNESS: I did not refer any business at that time to the Robinson firm. But if I merely answer the question that way, sir, it is not giving you the whole story.

THE COURT: I don't want to get into the whole story unless it is relevant, and I can't--

THE WITNESS: I don't think it is relevant.

MR. POWERS: I think it is very relevant.

THE COURT: I have to decide that and not you. I am having enough trouble dealing with your lawyers here.

THE WITNESS: Thank you.

THE COURT: Let's get back. You say that you did not refer any such client in May of that year, or indeed at any other time in that year.

THE WITNESS: That's what I want to--I don't want to leave half of the answer.

THE COURT: I appreciate that. I know you are trying to help here.

THE WITNESS: May Igive you the fill-in on it?

THE COURT: I don't want to get into a lot of irrelevancies here, which we have already indulged ourselves in quite a bit. Let me put it to you this way so we can march on to something important.

At any time during 1968, for example, did you have occasion to refer any pension and welfare clientele to the Robinson law firm?

THE WITNESS: No, sir. I mentioned the Robinson law firm in connection with it. They asked me to find out whether the Robinson law firm would be interested in taking them on, because they thought the firm would be too expensive. I asked them. They said they would. I had nothing more to do with it.

THE COURT: Allright. So that you had no occasion to mention any of this to either Mr. Frank or Mr. Kaufman or anybody else purporting to represent the Titans?

THE WITNESS: It took place in probably March or April.

THE COURT: But you had no occasion to tell these gentlemen of Titan about this?

THE WITNESS: That is correct.

THE COURT: Fine.

What is next, Mr. Powers?

BY MR. POWERS:

Q The beginning of your negotiations with Titan were in the first week of June in a meeting with Tony Frank, weren't they?

MR. COOPER: I will object to the characterization of it, your Honor. Certainly I think it is clear that there were no negotiations until Mr. Kaufman came, and that was the-- the first meeting was in September.

MR. POWERS: Let me rephrase it, to save time. I'm almost through with this witness, your Honor.

Q What was the date of the first meeting you had with anyone in Titan to discuss the acquisition of your companies by Titan?

A I don't know. I don't remember the date.

Q Was it in the first week of June?

A It seems to me it was a little later than the first week of June because it would have had to follow the late May meeting of the stockholders, and I don't know, but it probably was in June. I had dates when we talked about this before, but I don't recall them.

Q And the convention of the Furniture Workers, where the Robinson law firm was appointed their counsel, was

in the last week of May, wasn't it?

A I don't remember that, either.

Q You remembered it at your deposition, I believe, didn't you, Mr. Faggen?

MR. COOPER: I will object to this.

THE COURT: This is a comment, and we will wait for a moment because I think Mr. Powers wants to refer Mr. Faggen to some deposition testimony. Let's give him a chance.

Q Page 241.

"Q And so that you were reasonably sure that the change-over..." -- referring to the change-over of counsel in the Furniture Workers -- "took place at that convention in May of that year, 1968.

"A I am reasonably sure that the change-over took place at the convention, which I think was in May, 1968.

"Q Fine. Now, I note here on Tuesday, the 4th of June, that you called Ben Robinson. Do you know what that was about?

"A No."

Next page, 242.

"Q On June 11, you had a meeting with Ben Robinson. Do you know what that was about?

"A I can deduce, if you look on June 13, you will see that I had a meeting at 529 Fifth Avenue and

that was Titan's office, and I know that I had spoken to Ben.

"Q Before that meeting?

"A Before that meeting.

"Q And he talked about the possibility of being acquired by Titan, is that right?

"A About my exploring with Frank. So that I can only deduce that meeting on the 11th had to do with it because, you see, the 12th, it says the meeting Thursday, okay."

Do you remember being asked those questions and giving those answers back at your deposition in July of this year?

MR. COOPER: Your Honor, I am going to object to all of that as being totally irrelevant.

THE COURT: I am not sure I agree. I'll allow it.

Q Do you remember being asked those questions and giving those answers?

A Oh, yes. And, remember, I had diaries before me at that time, so that I could recall dates.

MR. POWERS: Nothing further at this time, and I reserve the right to cross examine Mr. Faggen.

THE COURT: Any cross examination, and I put that in quotations, I guess, Mr. Cooper?

MR. COOPER: Your Honor, I may be able to make this

very short. If counsel will concede that the notes in this case, which were issued to Mr. Faggen, the interest on which were not paid on May 1st, 1972 when due, and have been in default since that time--can we get that concession that the interest has not been paid on the notes issued?

THE COURT: As I read the record in the Court of Appeal there is no dispute on that.

MR. POWERS: No, sir.

MR. COOPER: I just wanted the admission on the record.

MR. POWERS: We filed suit the day the interest came due, May 1, 1972.

THE COURT: And thereafter there were no interest payments made on that date or subsequently thereto?

MR. COOPER: And that due notice and demand has been made with respect thereto.

THE COURT: Again, I understand that Titan concedes this.

MR. POWERS: Yes, sir.

MR. COOPER: Then I have no questions of this witness.

THE COURT: Thank you, Mr. Faggen.

(Witness excused.)

MR. POWERS: My next witness this morning is Mr.

Edmund Kaufman.

E D M U N D M A R V I N K A U F M A N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Kaufman, when did you first begin acting in any capacity for Titan Group, Inc.?

A In a sense, approximately about the time when the Gerald Block partnership, called Century City Investments, acquired ownership of approximately 500,000 shares of Titan stock. That was in approximately March of 1968.

Q At that time, did you take any office, formal position in Titan?

A No, I didn't.

THE COURT: That acquisition, Mr. Kaufman, was in March of '68?

A Approximately March 20 or 21st or 22nd of 1968. That was a purchase of stock from the Futterman family and related people.

Q You are a partner in a Los Angeles law firm, aren't you?

A Yes, sir.

Q What is the law firm, please?

A Irell & Manella.

Q And what field of law, if any, do you specialize in?

A Taxation and corporate securities.

Q And you specialize in the field of acquisitions, don't you?

A Yes, sir.

Q And you've had a great deal of experience in acquisitions?

A Yes, sir.

Q At the time the Block group purchased their shares in Titan, who was the chairman of the board of Titan?

A Ben Robinson.

Q Who was chief executive officer of Titan?

A That's a confusing thing to answer. At the time that the purchase of stock was being negotiated, Mr. Block discussed with Mr. Robinson the fact that Mr. Block would like to see Mr. Frank to become president, that he would recommend Mr. Frank to become president of Titan, and they had several discussions, mostly without my presence, and Mr. Frank, I believe, was formally elected president just preceding the closing of the purchase of stock, but approximately contemporaneously.

I don't know what the By-Laws of Titan said at that time. All I know is that at about the time of that purchase

in March, Mr. Frank became president and effectively was the chief operating officer and Ben Robinson remained as chairman of the board.

Q Was Ben Robinson also denominated chief executive officer?

A As far as I know, he was by that time, but I am certain that subsequent to that time, he very specifically was made--was denominated as chief executive officer.

Q And can you fix a date when he became chief executive officer?

A Well, I think he had been for eight or nine years, but I do know that after the acquisition in May, I think immediately after the annual shareholders meeting, there was an annual board meeting and the By-Laws were adopted or altered specifically to reflect the fact that Mr. Robinson was to be the chief executive officer, and Mr. Frank the chief operating officer.

Q So, Robinson held two offices all through 1968 after this meeting, is that right?

MR. COOPER: If your Honor pleases, I think we might be able to get the best evidence, which would be the By-Laws themselves. I think this witness is testifying from memory.

THE WITNESS: Very short memory, Mr. Cooper.

MR. COOPER: Just a moment.

THE WITNESS: I read them today.

THE COURT: In any event, again, we have gotten his best recollection. Let's go on to something else.

Q Mr. Kaufman, when did you first hear about the Faggen Companies?

A In approximately June or July, or conceivably August, in any event, in the summer of 1968.

Q When you first heard about the Faggen Companies in the summer of '68, who did you hear about them from?

A I believe from Ben Robinson. It is conceivable that Tony Frank mentioned them also.

Certainly, the first discussion that I had of any moment was with Ben Robinson.

Q What did Robinson tell you about the Faggen Companies? First, can you fix a date for that discussion?

A The closest I can come, because I had a large number of discussions, both in person and by telephone with Mr. Robinson, so the best I can do is say it was sometime in the summer of 1968.

Q Was it a face-to-face conversation?

A Well, I had several with him, but I don't know whether that was the first occasion when I heard the name Faggen.

Q And were you in New York at that conversation?

A I believe all of my meetings with Mr. Robinson, with

perhaps one exception, were in New York. Certainly those meetings at that time were in New York.

Q Incidentally, at this time the Robinson law firm had what position as lawyers with respect to Titan?

A To my knowledge, they had theretofore been general counsel for Titan for perhaps a decade or, at least, since the beginning of its existence, and, again, specifically in May, several months after the Block group purchased the shares, Mr. Robinson's firm was reappointed as general counsel by the board of directors.

MR. COOPER: Your Honor, I am going to object to this line as to relevance, as to what position Robinson's firm held with Titan, this witness's testimony with respect to it. I think it all ought to be stricken.

THE COURT: I don't quite agree with that. It may not be important, as you argue, but I see no reason why, we have already gotten into it anyhow, we should suddenly stop with Mr. Kaufman.

Let's move along. What is next, Mr. Powers?

Q What did Robinson tell you about the Faggen Companies?

MR. COOPER: That I am going to object to. That is pure hearsay.

MR. POWERS: Your Honor, I think this kind of information on the Faggen Companies, which was transmitted to the

negotiator--

THE COURT: Before we get to that, are you going to call, or is somebody going to call, Robinson?

MR. POWERS: Yes. We have his deposition. He is going to be testifying here later this week.

THE COURT: Later this week doesn't have much time to go. But, in any event, somebody is going to call him.

MR. POWERS: Absolutely.

THE COURT: This all seems to me like preliminary matter, anyhow, isn't it?

MR. POWERS: All right, your Honor.

THE COURT: I'll take it subject to the appearance of Robinson, and let's see what happens.

Q What was told to you about the Faggen Companies by Robinson?

A Mr. Robinson was talking to me in the context of suggesting that Titan acquire the Faggen Companies. He told me that he had known Harold for a number of years, that he had an extremely high regard for Harold as a professional person, for his integrity, for his business ability, that he thought that--he described the Faggen actuarial operations to me and indicated that he thought that there would be an excellent fit between that operation and Titan's insurance brokerage operation, that the Faggen actuarial operations had

outstanding growth possibilities and that it would be an excellent acquisition for Titan to consider.

Q Did Robinson tell you that partners in his office were co-venturers with Faggen in several real estate partnerships?

A No, sir.

MR. COOPER: Objection.

THE COURT: I don't mind your getting into this with Mr. Faggen. But, my heavens, you are not accusing Mr. Kaufman here. He is not a defendant in this case.

MR. POWERS: I am just trying to establish there was no disclosure here, your Honor.

THE COURT: No disclosure by Robinson. But you are not accusing Robinson. Now, come on.

Q Mr. Kaufman--I'll withdraw that question--when was the first time that you discussed the issue of price for the Faggen Companies?

A With whom?

Q With either Mr. Robinson or Mr. Faggen.

Q When I first had a lengthy conversation with Mr. Robinson, which would have been during the summer of 1968, he mentioned to me that Mr. Faggen had apparently been considering other acquisitions and that the price was going to be somewhere in the $7-to-$7.5 million dollar range, and

that Mr. Faggen wanted a tax-free reorganization, and that therefore we were talking about a large number of shares of Titan stock.

Q When did you have your first negotiations with Faggen on the subject of acquiring his companies?

A That was on September 6, 1968.

Q What were the circumstances leading up to your entering into that negotiation with Faggen?

A Well, I had discussed the potential acquisition with Mr. Robinson, as I say, on several occasions. I had also discussed the matter with Tony Frank, and to a lesser degree with Gerald Block back in Los Angeles, and we were concerned that such a transaction, given the fact that Titan stock was selling at $15 or thereabouts, would require something like 500,000 shares, and we didn't initially want to consider making an acquisition which would issue such a very large block of stock to one man, given the fact that our group, Mr. Block's group, had only 300,000 shares.

And, consequently, our initial inclinations were not to consider the transaction.

After considering it and talking about it further, and particularly after Mr. Robinson continued to extol the virtues of the Faggen operation, we then had discussions--that is, Mr. Robinson and I and Mr. Frank--about how we could

make the transaction and yet not place such a large number of shares in Mr. Faggen's hands, and I think at some point during those discussions I suggested the possibility of using convertible debentures, which would be convertible at a premium and thereby reduce the number of shares ultimately that would be issued to Mr. Faggen.

Q Was this before your first meeting with Faggen?

A Yes.

MR. COOPER: Excuse me. Can we have the question to which that answer was given read back? I would like to move to strike about 90% of it, but I don't know what part of it is responsive.

THE COURT: I will deny that motion although technically you might have a point toward the end. But it is of no consequence because we have no jury here and my principal concern is to keep both of you going so we get somewhere.

MR. COOPER: Your Honor, the only thing I would like to do, though, in making this statement now is, I would like, since this witness is under direct, to have as responsive answers as possible without a great deal of--

THE COURT: We will struggle toward that end within tolerable limits, Mr. Cooper. But that is a pale consideration, indeed, in comparison with my concern that we take so long to get down to the real issues in this case.

I want to give Mr. Powers a little latitude. He is entitled to that.

Now, go ahead.

BY MR. POWERS:

Q Mr. Kaufman, when was your first meeting with Faggen?

A September 6th, 1968.

Q Did you have a discussion with Robinson prior to that meeting?

A Numerous discussions.

Q Did you have any specific financial information on the Faggen Companies before that meeting?

A Yes. Either from Mr. Robinson or from Mr. Frank I had understood that the Faggen entities were earning in the neighborhood of a half million or more per year, pre-Federal income tax.

Q Did you have anything in writing on their earnings before the meeting?

A Prior to the September 6th meeting? I don't believe so.

Q Did you have that September 6th meeting at the Robinson offices?

A Yes.

Q I show you Exhibit 5 for identification and ask you if that document is a set of notes in your handwriting with

respect to that September 6th meeting and with respect to an October 2, 1968 meeting held thereafter.

A Yes, it is. There are a few sentences written on both pages that are not in my handwriting, but the bulk of it is in my handwriting.

Q And were those notes with respect to the meeting on September 6th made contemporaneously with the occurrence of that meeting?

A Yes.

MR. POWERS: I would like to offer these notes in evidence, your Honor.

THE COURT: I don't know what your theory is, but, let's see, maybe the defense won't object.

MR. COOPER: I am going to object.

THE COURT: There is no indication that his recollection needs refreshing or anything of that nature. He is here. Why do you offer the document?

MR. POWERS: Your Honor, I think it helps indicate all of the items which were discussed at the meeting.

THE COURT: I know. But we have to deal within some limits with the rules of evidence. These are handwritten notes that he took of these meetings. But he is here. He hasn't indicated that he needs his recollection refreshed. Maybe he does. Then you can use them for that.

MR. POWERS: I'll move on, then, your Honor.

THE COURT: But just to offer them willy-nilly, I don't understand any theory for that, and the defense has objected, which they are entitled to do even though you and I might think they are silly to object. But they have objected and they are entitled to it.

On that note, let me suggest this to you. Why don't you ask him, and if his recollection is exhausted, he can use these notes and that will be that, no harm to you.

I think we deserve a break, however, for luncheon, and I suggest that we break now. It is approximately 1, and we resume at 2:15 o'clock.

MR. COOPER: Your Honor, perhaps, just before we break, might I make some observation with respect to the basis of my objection on that? I don't want to burden you.

THE COURT: Look, why make any observation? I've already gone along with you and said that I will not receive it because you are entitled to object, and Mr. Powers isn't harmed because he can ask Mr. Kaufman. So, why expand the record even more fulsomely than it already has been expanded with no particular profit to any of us.

See you at 2:15.

(Luncheon recess.)

AFTERNOON SESSION

2:40 P.M.

E D M U N D M A R V I N K A U F M A N, resumed.

THE COURT: Gentlemen, I apologize. I got interrupted just as I was about to step out here at 2:10. I am going to think that maybe my idea wasn't a very good one, and I apologize for the imposition on your time.

But we were in the process of asking Mr. Kaufman, as you probably remember, Mr. Powers, about Plaintiff's Exhibit 5 for identification, and you go ahead and ask him whatever you will about that.

DIRECT EXAMINATION CONTINUED

BY MR. POWERS:

Q Why don't you tell us in your own words, as best you can recall, Mr. Kaufman, everything that Mr. Faggen said and the substance of everything that you said at that meeting on September 6th, 1968.

A Certainly. We met in Mr. Robinson's offices, at his firm's offices, and I'm not sure whether Mr. Robinson was there at any time, he may have been. I do recall Mr. Aronson was present during much or all of the meeting, and we discussed a description of Mr. Faggen's business and all of the things that I was interested in in trying to determine--in what he was interested in trying to determine, whether there was a

reasonable basis for the two companies to combine.

I asked Mr. Faggen various pointed questions about the nature of his business, how many clients he had, who his clients were generally, and the kind of services he performed, why he was interested in selling out. I had some concern over the fact that Mr. Faggen was in the late fifties, and I wanted to be assured that there would be continuity to the business after Titan acquired it, so I discussed with him the nature of his employees and the responsibility which they had, and all of the business aspects, including financial aspects of his operations.

He generally informed me that his operation had something like several hundred employees--excuse me, several hundred accounts, customers, that he had something in excess of 30 employees, that he had a wealth of data in connection with his performing his actuarial services for millions of employees and that that data could easily enable him to get into the data processing business with ready-made customers and with relatively minimal expense.

He indicated to me that he had had negotiations with Diebold and with Levin-Townsend, and that the price that they had offered was in the range of some twenty times net after taxes, or the equivalent of ten times pre-tax earnings, plus his net worth, which was estimated to be in the range of a

million and a half to two million dollars, and therefore that his offer was in the range of 7 to 7.5 million dollars--

Q From Diebold?

A From Diebold and from Levin-Townsend. He indicated that for various reasons he didn't particularly want to go with either of them. As I recall it, he expressed some strong reservations about going with Diebold, although in no detail whatsoever. He did not inform me of anything other than that he did not like them.

He, I thought, either at that meeting--I believe it was at that meeting that he gave me not only the numbers orally but adjustments--a tax return for his principal companies, together with handwritten adjustments to show how he had arrived at earnings pre-tax of in excess of 550,000. I think the exact number was like $571,000.

I think at that meeting, assuming he had handed it to me just then, it was either just then or I received it shortly thereafter, I of course examined them, we discussed who had responsibility in his organization--

Q Excuse me, if I can interrupt you. Is this the document you are referring to? I show Exhibit 1 for identification. Is that the document you were given at that meeting?

A I believe so.

Q Did you provide that document to me a year or two ago?

MR. COOPER: I'll object to the leading, your Honor.

THE COURT: Well, I don't see any harm done here.

A At the time Mr. Powers contacted me and indicated that he was representing Titan, he asked me to search my files for whatever relevant documents I might have. I searched my files and found the originals--I assume, I don't know whether it was the originals or Xerox which I had. But I had this document.

Q And the document, as it was contained in your files, included the two pages of adjustments, a tax return with the name of the Faggen Company inked out and a balance sheet, is that right?

A A summary balance sheet, yes.

Q And this was in Harold Faggen's handwriting?

A I assume so.

MR. POWERS: Your Honor, I would like to re-offer this. The only difference between 1 for identification and 1-A is that it has the tax return hanging on it and the balance sheet hanging on it. Otherwise, there is no difference.

THE COURT: Any objection, Mr. Cooper?

MR. COOPER: I make the same objection that I made earlier, that this is not within the scope of the pleadings.

THE COURT: I disagree with you on that, at least for purposes of admissibility, which is a relatively low and

different threshhold. In other words, I understand your position to be that this is not directly relevant to the real issues at hand, That may be generally true.

But, certainly at this stage, I think it is admissible subject to one ambiguity that Mr. Kaufman, I'm sure, can clear up.

BY THE COURT:

Q These documents, which we know here as Plaintiff's Exhibit 1 for identification, Mr. Kaufman, I take it those were given to you in this bundle by Mr. Harold Faggen at the September 6th meeting?

A I believe so. I have thought about that at great length, and I wasn't certain in my own mind whether he had given them to me at that meeting or, conceivably, had merely told me the substance of them and had mailed them to me. But I received them one way or another from Mr. Faggen.

Q Very good.

A And probably at that meeting.

THE COURT: I will overrule the objection and receive Plaintiff's Exhibit 1 for whatever they are worth.

XXX (Plaintiff's Exhibit 1 for identification was received in evidence.)

BY MR. POWERS:

Q Mr. Kaufman, before we leave Exhibit 1, did you read

it at the meeting?

A Yes. Assuming I had it at the meeting, which I think I did, I am sure I looked at it. I would have looked at the tax return and all the rest of the documents.

MR. COOPER: I move to strike that answer, your Honor.

THE COURT: No. I will let it stand. I get the point. I am not going to rely on assumptions.

Q Mr. Kaufman, did Mr. Faggen give you any explanation of those adjustments contained in Exhibit 1?

A The only explanation that I have ever received from Mr. Faggen was to the effect that these were to indicate the nature of the earnings, the level of earnings of the Faggen Companies as distinguished from that which they were reporting on their Federal income tax returns.

Q Did Mr. Faggen in substance say to you that these adjustments were not reliable and he disagreed with them?

MR. COOPER: I'll object to it, your Honor, as leading.

THE COURT: Well, at the moment, I'll sustain the objection. However, we may get around to a little leading later.

Let's put it initially without leading, Mr. Powers. I understand the point, of course.

Q What, if anything, did Mr. Faggen say to you on the

nature of these adjustments?

MR. COOPER: Are we talking about September 6th, now?

MR. POWERS: Yes. We are at that same meeting, when he handed him Exhibit 1.

A Those adjustments were represented to be reasonable, realistic and accurate adjustments. They were not suggested to me to be the product of anyone---or, at least, not the responsibility of anyone other than Mr. Faggen. It was not suggested to me in any fashion that there was any reason why I should not rely on those adjustments.

MR. COOPER: I move to strike as not responsive, your Honor.

THE COURT: Well, I'll strike the last portion. I'll only take, in other words, what he recalls that Mr. Faggen said.

Q Anything else that Mr. Faggen said on the subject of those adjustments at that meeting?

A You know, I don't recall the conversation verbatim, so I guess I can't answer that.

THE COURT: Do your notes, which we have marked here as Plaintiff's Exhibit 5 for identification, help you on that in any way?

(Notes handed to the witness.)

THE WITNESS: I don't think so, your Honor. My notes clearly indicate that I knew what the numbers were, the bottom line numbers, but they don't specifically deal with any of the adjustments or in detail with the financial data. They do indicate that we were talking about a number of ten times earnings or plus net worth, or approximately 7 to 7.5 million, and those are the numbers I recall.

THE COURT: But your notes don't make any specific reference to any remarks which Mr. Faggen had to make regarding the adjustments as such.

THE WITNESS: To this extent, and that is that my notes indicate that the earnings we were talking about excluded investment income, which is my recollection as well.

THE COURT: All right.

BY MR. POWERS:

Q In that connection, did you specifically discuss the item of investment income with respect to the Faggen Companies at that meeting?

A We discussed it in the sense that our discussion proceeded on the basis that it was clear between Mr. Faggen and myself that we were not--whatever multiple we were talking about and whatever basis we were talking about--we were not including investment income as part of the computation.

Q Was there any discussion of the reasons why investment

income was not being included?

A Well, Mr. Faggen was proposing a transaction which involved our paying for his net worth as well as a multiple of earnings, and, of course, the net worth, a large part of that, was investments which were yielding interest and dividends, and if we were paying for net worth, for the stocks and bonds themselves, it would have been irrational, in fact it was irrational, to think in terms of also multiplying the dividend income and the investment income.

Q Now, was investment income excluded from Exhibit 1?

A What is Exhibit 1?

Q The list of adjustments.

A Yes, yes. In making those adjustments, starting with the tax return numbers, in each case, as I recall, there was a deduction, a removal of the investment income to get to operating income.

Q What, if anything, did Mr. Faggen tell you specifically on what he wanted for his company and what did you say on that subject?

A Well, as I remember, we started talking along the lines of a tax reorganization. I had thought at the time that Mr. Faggen was a C.P.A. as well, at least had been admitted to the bar and was knowledgeable about tax matters, and I assumed in my own mind, I know, that he had some tax problems

in making a sale other than in a tax-free reorganization, and we started out talking along those lines. My recollection is that there was no attempt by me to negotiate price with him at that meeting. I elicited some comments about what price he had in mind, what price he had been offered from these other companies, and then I went on to elicit additional information so that I could more fully evaluate his company. But I don't believe that atthe September 6th meeting, I don't recall our getting into any real negotiation over the price, and I certainly made no proposal at that time.

Q Did Mr. Faggen say anything about multiples of earnings in connection with price?

A Yes, both in the sense that he informed me as to what he had been offered by others and that in the sense that he was actually proposing a transaction to me, I think, not necessarily that I could have shaken hands and said okay, it's a deal, but he was at that point subject to further discussions and whatever people do in this kind of transaction, was proposing a transaction to me to be made at 20 times pre-tax earnings plus net worth.

Q Did you mean to say pre-tax?

A I'm sorry; 20 times after-tax or ten times pre-tax.

Q What, if any, discussions did you have with Mr. Faggen on the subject of his earnings in years prior to 1968?

A My best recollection is that I was told that his earnings were generally on a constantly ascending scale, not that they necessarily went up each and every year, but that his business was expanding and that at some reasonable good rate that he had a growth company, and that his earnings record would reflect that.

Q Did he tell you any specific earnings figures for the years prior to '68, that you recall?

A I don't recall his doing so at the September 6th meeting. He might have mentioned some figures, but I really don't recall them.

Q What, if anything, was said on the subject of his number of clients?

A My recollection there is that he indicated that he had several hundred clients.

Q Did he tell you anything about losing any clients in 1968?

A No. I discussed the nature of his clients and his clients' relationship with him at some length, and he indicated that he, as I say, had had a growth situation, that he was adding clients generally, and while I can imagine every service business occasionally loses clients, certainly the clear impression was that there was a net gain, a substantial net gain and no material loss of any clients.

Q What, if anything, was said on the subject of going into the computer field?

A Well, I've already indicated just a few minutes ago that he impressed me with the facts that he had been serving pension and profit-sharing or welfare plans which have millions, literally, I think he said, millions of participants and that he had accordingly collected large amounts of data on these participants, that he had a ready-made data bank, and that in the course of doing the work for his clients, actuarial work, that it would be a very easy thing for him, given some modest investment in additional computer hardware, to expand the nature of his services by providing computer services.

Q Did he tell you anything on the subject of computer programs at that time?

A Well, I'm not much of an expert on computers. My recollection was that he indicated that they were--that his operation, his people were quite knowledgeable about computers and had developed their approach sufficiently so that this was not pie-in-the-sky talk; this was a statement by him indicating that in effect market testing had been done, he needed the data and he had the customers, and that he was prepared, with a modest injection of capital, to proceed ahead.

Q Now, I ask you to look at your notes, Exhibit 5 for identification, and see if there is anything more in the notes

which refreshes your recollection on any other statements Mr. Faggen or you made at that meeting on September 6th, but restrict yourself to that first meeting, please. Is there anything that comes to mind other than what you've already told us?

A Well, he impressed me with the fact that he thought there was an excellent fit between the actuarial and data processing activities and our insurance agency and brokerage operations. He mentioned, for example, that Alexander and Alexander, which is a major insurance brokerage company, had acquired an actuarial company, and then he mentioned also that other companies, Merrill Lynch, Wertheim and Levin-Townsend previously, had also acquired actuarial firms. He told me some of the details of his situation, such as that he was the sole shareholder of all of his companies, with the exception of some trusts for his children as to one company. He indicated that--well, we discussed at some length the nature of his clientele, and I was trying to determine the extent to which he would be highly dependent upon one or a very small number of clients, and he indicated that his largest client was I.T.U., which provided no more than approximately $100,000, in fact my notes say less than $100,000, per year of his aggregate gross fees, and that there were a few others which provided fifty to seventy thousand per year.

We discussed also the question of responsibility for clients, as I recall, and he mentioned that Rose Dogan, who I had not met to that date, had substantial responsibility and that we need have no particular fear if something were to happen to Mr. Faggen, that Miss Dogan was fully capable of essentially running the operation and had client contact, and that many of the clients depend upon Miss Dogan rather than on Harold Faggen.

Q Now, what was the ultimate conclusion of that meeting on September 6th?

A I think the ultimate conclusion was that we had a friendly meeting, that I was impressed by the apparent sincerity and intelligence of Mr. Faggen, the numbers he had given me were certainly extremely impressive, the apparent fit with the insurance operations was a real plus, and I think we closed the meeting on a friendly note, with my stated intention that I would get back to him.

Q Did you have any contact with Mr. Faggen after the close of that meeting?

A Approximately a month later.

Q Did you have any telephonic contact with him before the next meeting?

A It is conceivable that I may have, but I don't recall any, and if I did, it was nothing more than, "I'll see you in

a week," or something of that sort.

Q What, if any, considerations were taking place within Titan on the subject of the Faggen acquisition after this meeting of September 6th, before we go to the next meeting?

A Well, I can tell you the conversations that I participated in.

Q Yes. Go ahead.

A Which were numerous conversations with Tony Frank and with Ben Robinson, both telephone calls and in person.

I reported to them the substance of my meeting with Mr. Faggen and we discussed, during the course of that month, at some great length what kind of deal we should make and whether we should do the deal. Mr. Robinson was always very affirmative to me in suggesting to me that this would be an excellent acquisition and in connection with his very high regard for Mr. Faggen, and then ultimately, before the next meeting I had with Mr. Faggen, we discussed the fact that I should be the one to go in and to do the final negotiation, not because I was a representative of any particular group but more because Ben suggested to me that his long-time friendship with Harold would put him in an embarrassing position, he didn't want to be the one to sit down and haggle with Mr. Faggen over price.

Q What precisely did Mr. Faggen tell you at your meeting

on September 6th about his long-term relationship with Mr. Robinson, if anything?

A It was just apparent at that meeting that he and Ben had known each other for a long time, and I think I was just left to my assumptions, which is that they were consultants, one legal and one actuarial, for some of the same clients and that they had known each other. But I don't recall any particular discussion between Mr. Faggen and me relative to his relationship with Ben Robinson.

Q Do you recall any discussion with Ben Robinson on that subject?

A I have to explain this a little.

I thought that Mr. Robinson's firm--I knew that they were general counsel--

MR. COOPER: If your Honor pleases, are you taking this--I would object to third party conversations not in the presence of the defendant.

THE COURT: Aside from that, I don't really think that we are getting very far if all we are going to indulge in is the thoughts of Mr. Kaufman. That's not the stuff of which 10b-5 cases are built, Mr. Powers.

MR. POWERS: I withdraw the question, your Honor.

THE COURT: There may be some conversations on this subject with the defendant. I don't know.

Q Up to this point, you testified to all the conversations with Mr. Faggen on this point that you can recall, is that right?

A Up to that point, yes.

Q Now, have you told us about all telephonic conversations with Mr. Faggen up until October 2, 1968?

A As I said, I don't recall any particular telephonic conversations with Mr. Faggen.

Q Did you have a face-to-face meeting with him on or about October 2?

A Yes.

Q Where was that meeting?

A That was at Mr. Faggen's offices in lower Manhattan.

Q Who was present?

A Well, my notes indicate that Mr. Frank was present. I don't have a clear recollection whether he came at the same time I did or came in in the middle of the meeting or what. But apparently he was present for at least part of that meeting.

Q But no one was present except Mr. Faggen, you and probably Mr. Frank, is that right?

A Again, I don't remember whether an employee stuck his head in or something of that sort. But no one else was present at that meeting for the purposes of the discussion we were

having.

Q All right. And can you tell the Court what Mr. Faggen said and what you said at that meeting?

A Well, the purpose of that meeting was to negotiate the transaction, and I made it clear that we--that I was there for that very purpose, and I offered him the price--I don't recall whether I offered a slightly lower price and came up, but I came very close to offering him that price which he ultimately accepted, which was $5.5 million in convertible subordinated debentures, convertible at $20 a share with interest at 4%, payable essentially at the end of 10 years. And that was the transaction we discussed, and, as I recall, Mr. Faggen said that will be acceptable, and that was it.

Q Did you look at any tax returns of the Faggen Companies at that meeting?

A I don't recall whether I looked at them at that meeting. I may have. I know that I looked at the tax returns either prior to that meeting or around the time of that meeting

Q Did you discuss adjustments from the tax returns with respect to earnings?

A I don't recall what the specific adjustments to earnings of prior years were other than that comparable adjustments to those in '68 would undoubtedly be applicable.

Q Was there any discussion about not using the same

adjustment for '68 as had been set forth in Exhibit 1?

MR. COOPER: I'll object to that as leading and suggestive, your Honor.

THE COURT: Yes. I don't really know why we have to take a lawyer, who claims to be a specialist in this field, and lead him. I really don't. I would think you wouldn't like to do it either. It raises unnecessary connotations which may not be used.

Let's go back. We are in the October 2 meeting now. We are downtown in Manhattan here.

BY MR. POWERS:

Q What, if anything, was said on the subject of earnings adjustments for 1968 or any prior years?

A Our meeting proceeded on the basis that the figures previously given to me for 1968 were the accurate ones and the relevant ones--

THE COURT: No, no, wait a minute, please, Mr. Kaufman. You know, or you had better know, that that won't wash. The question is, what was discussed.

Q What were the words said and what were the words said by Mr. Faggen, if any.

THE COURT: Exactly. You had certain assumptions, properly enough, but we are not interested in those. What was said, sir?

THE WITNESS: Well, obviously, at a conversation 5-1/2 years ago, I can't quote the exact words that were said.

THE COURT: No. In substance is fine.

A In substance, I indicated that the price that I was offering was based upon the figures that had been given to me previously, and that we were dealing with essentially an acquisition at his price, except that I was not willing to pay in addition to a multiple of earnings, to pay separately for net worth.

And what I said was words to the effect that we would be willing to pay him his twenty times net after tax or his ten times pre-tax earnings of approximately $550,000 for the year '68, but we would not be willing to pay in addition to that an amount which would be related to his net worth, that we expected the net worth to be part of the package if we were paying that high a multiple for his earnings.

Q Was there any discussion on the subject of investment income in that connection?

A Yes. We were talking about the same $550,000--I was working from the figures that Mr. Faggen had given to me, which specifically excluded investment income, and the way in which we got to and the way in which I characterized my offer to him was ten times approximately $550,000 of operating income.

Q Now, at that meeting, was there any discussion of the

subject of further write-ups of the back-up material that had been talked about?

A Yes. I believe that I told him something to the effect that he ought to have some data, history of his company, etcetera, written up for presentation to the officers and the board of Titan.

Q Was there any discussion on the subject of the number of his clients at that meeting?

A No, I don't recall any.

Q Now, looking at your notes of the meeting, does any other material discussed at the meeting come to mind? Have you told us everything in substance that you said and that Mr. Faggen said at that meeting?

A Mr. Faggen indicated that the Internal Revenue Service was examining one or more of the corporate returns for the fiscal years ending in '67, that the '68 return had not yet been filed, and that '64 and '65 had already been audited, and that '66 was apparently not under audit, had been dropped.

And he also indicated that one of the things motivating him to make the transaction was an apparent accumulated earnings problem, that he had accumulated so much earnings and kept them in the form of liquid securities that he would have an additional tax problem if he continued along those lines.

Q Does anything else come to your recollection about the meeting?

A I don't believe so.

Q What was the ultimate conclusion of that meeting?

A The ultimate conclusion was that subject to the lawyers working out a formal contract and there being no particular hang-ups over other important matters, such as covenants not to compete, warranties and representations and a whole lot of things, that in principle we had an understanding and we were prepared to proceed in good faith on that basis towards finalizing the transaction.

Q Now, at that meeting, did Faggen say anything to you about negotiations with other people?

A I don't recall any.

Q And what, if anything, did you do at the close of that meeting?

A I believe that the meeting started in the morning and that at the close of the meeting it was still probably before noon, I went over to either Mr. Robinson's office at his law firm or in his office at Titan Group.

Q And did you then have a discussion about the transaction there?

A I think so. I know I talked to him shortly after the meeting with Mr. Faggen and reported on the substance of

my meeting.

THE COURT: In other words, this agreement in principle was subject to something more than just the lawyers working out the details. You had to get board approval.

THE WITNESS: Absolutely.

THE COURT: And you apparently did.

THE WITNESS: Well, Titan did.

THE COURT: Well, yes.

MR. POWERS: That is the next subject I am turning to, your Honor.

THE COURT: Fine.

Q This meeting closed on October 2, is that right?

A That is correct.

Q Now, what happened after October 2 with respect to board approval, if any, by Titan?

A Well, the board approved it.

MR. COOPER: If your Honor please, I think it is clear that Mr. Kaufman was not a member of the board at that time.

THE COURT: No. But he was representing Titan.

MR. POWERS: Your Honor, I just have one question. I'll come right back to this, if I may.

Q Mr. Kaufman, at that meeting on the 2nd, in Mr. Faggen's presence did you make any notations of any of the

material you reviewed?

A I don't believe so. If I did, I might have been doodling or something. But I don't have any record of having done so, and I don't recall having done so.

Q Did you make any notations other than those contained on the 2nd page of Exhibit 5 for identification?

A Not to the best of my recollection.

Q And does Exhibit 5 for identification contain any one's writing besides your own?

A Yes. It contains the writing of a person who was then an associate in my law firm and who is now a partner, Richard Bernacchi.

Q Where does that writing start?

A Just below mine in the middle of the page, where it starts, "1. More than one company."

Q Where the second dash mark is on the second page of Exhibit 5.

A Yes.

MR. POWERS: May I re-offer these notes in evidence? Because he did testify to them. I think it would make the record more complete.

THE COURT: Again, you could certainly re-offer them. But Mr. Cooper is not aware of what is going on.

Mr. Cooper, he is trying to offer this document,

which are Mr. Kaufman's handwritten notes.

MR. COOPER: I have no objection.

THE COURT: All right.

MR. POWERS: Thank you.

XXX (Plaintiff's Exhibit 5 for identification received in evidence.)

Q What, if any, contact did you have with the approval of this matter by the Titan board between October 2 and--do you recall the date it was approved?

A I think it was about a week later.

Q What contact did you have with that subject in the interval?

Q Well, as I indicated, immediately after my meeting with Mr. Faggen, I spoke to Mr. Robinson, who was of course then chairman of the board and chief executive officer, and I discussed the matter with him. I think I may have--I believe I did talk to, as well, at least one other member of his firm, perhaps either Mr. Rosen or Mr. Aronson. We decided that he and Tony, Mr. Robinson and Tony Frank, would take care of submitting whatever information was necessary to the board, inasmuch as they were on the board and I was not, and that I would--inasmuch as I had negotiated the transaction, that I could usefully prepare the first draft of the agreement for his law firm to carry it from there.

Q Were you acting as counsel for Titan at that time?

A Yes, in a special capacity of being hired to negotiate the transaction.

Q Who was general counsel for Titan at that time?

A Ben Robinson.

Q Now, did you have any contact with Tony Frank prior to the board meeting with respect to the subject of a write-up by Mr. Faggen?

A Well, Tony and I were frequently discussing various matters, and we discussed the fact that he was going to have Mr. Faggen present appropriate materials to him for submission to the board.

Q I show you Exhibit 6 for identification. Is that a memorandum you received from Tony Frank on the date shown?

A Yes, it is.

MR. POWERS: I would like to offer this memorandum now in evidence, your Honor.

MR. COOPER: I object to discussions not in the presence of this defendant, in which he and others may have had any discussion regarding this transaction.

THE COURT: If you would allow me to look at it, I'll rule on it. But until I look at it, I don't even know what you are talking about.

MR. POWERS: The second check mark is the relevant

portion, your Honor. (Handing.)

THE COURT: I don't understand the point. It certainly isn't binding on Mr. Faggen.

MR. POWERS: It is merely to show the documented sequence of events, that Mr. Faggen was asked to write up a letter for the board on or about October 6, for the board meeting held on October 9.

THE COURT: Fine, But that doesn't make this admissible. I'll tell you what. You have every right to ask Mr. Kaufman what happened. Again, this may be used to refresh his recollection.

MR. POWERS: Thank you.

Q Mr. Kaufman, what happened with respect to any write-up of the Faggen Companies for submission to the board, if you know?

A Mr. Faggen wrote up a summary of the nature of his company and included financial data which I understood to be consistent with that which he had given me and which was--

MR.COOPER: I object to that, if your Honor pleases.

THE COURT: Yes.

You say that Faggen wrote up a summary. Did you request him to do this?

THE WITNESS: Yes. I believe I stated it at our last meeting.

THE COURT: And, in fact, he then did and you saw it.

THE WITNESS: I saw it ultimately. I did not see it at the time of its presentation to the board.

THE COURT: I see. It was something which you requested that Mr. Faggen write up and then submit to the board before their meeting in which they would decide whether or not they would approve it.

THE WITNESS: Yes, through his continuing contact with Mr. Frank and Mr. Robinson.

THE COURT: All right. So he wrote up a summary. Next question.

Q Now, is that summary Exhibit 3, which I now show you?

MR. COOPER: I object to that, if your Honor please. He didn't see it.

THE COURT: He said he did see it ultimately. We'll take his answer.

MR. COOPER: Your Honor, I think it is conceded and I think it is part of the evidence in this case that he did not see this until April of 1972.

THE COURT: It may be so, but I don't know that. That is no ground to object. Let's see what he can tell us. The trouble with you and Mr. Powers is you've already decided this case, and I'm a little bit depressed by that. I wish you

were here since you both have decided.

Now, let's go ahead. Show him this and ask him if he can identify it.

Q Can you identify Exhibit 3?

A Yes. That looks to me like the submission to the board of directors in connection with the acquisition of the Faggen Companies.

Q I call your particular attention to the fourth page of that exhibit, which is denominated Exhibit A to the exhibit, called Net Income Pre-Tax. Did you have familiarty in October of 1968 with the adjusted earnings figure shown on that document?

A Yes. I had quite a bit of familiarity with the adjusted earnings figure shown for the year 1968 and some rather generalized knowledge of the area of the earnings for the prior years.

Q And how did you acquire that knowledge?

A From Mr. Faggen.

Q And was that acquired at your meeting with him on or about October 2, 1968?

A No. That had been previously--

MR. COOPER: Objection to leading, your Honor.

MR. POWERS: I withdraw the question to avoid any argument.

Q When and how did you acquire that knowledge, Mr. Kaufman, if ever?

A I acquired the knowledge of the 1968 earnings on or about the meeting of September 6th and, in general, some knowledge of these numbers for the prior years, the preceding years, subsequent to that, and perhaps in more detail at the meeting in October, although I don't recall that specifically.

Q Mr. Kaufman, did the Titan board ultimately approve the deal?

A Yes.

Q And can you tell us the date it was approved?

A My best recollection is that it was approximately in the middle or the early part of October, about the 9th, 10th.

Q What was your contact with the deal next, following the approval on October 9th or 10th, as you've testified?

A I, pursuant to the suggestion from Mr. Robinson, drew up the first draft of the document, of the basic document, including the form of subordinated convertible debenture, and transmitted that document to Michael Rosen for them to use in consummating the transaction.

THE COURT: Who was Michael Rosen?

THE WITNESS: Michael Rosen, your Honor, is a young lawyer who was employed by Mr. Robinson's firm at the time

and the one who had responsibility for continuing the transaction.

Q Now, after you sent those documents to Michael Rosen, what, if anything, did you do on the Faggen acquisition?

A I had an occasional communication with Michael. He sent me at some later date a revised copy of the draft of the agreement. I believe we had one or two phone calls where we discussed things like registration provisions primarily, and also there was a communication dealing with the fact that the numbers were going to be--the conversion price as to a small amount of the debentures was going to be reduced. But essentially I had very little to do with the transaction after I sent him the first draft.

Q What, if any, responsibility did you take for those papers in connection with the transaction in October?

A What papers in--

MR. COOPER: I'll object to that, your Honor.

Q The final contract.

MR. COOPER: I'll object to that, what, if any, responsibility did he take. I would like to know what he did.

MR. POWERS: I will rephrase the question, to avoid an argument.

Q What, if anything, did you do with respect to the contract documents after you sent this draft to Michael Rosen?

A When Mr. Rosen sent me a revised draft, I looked at it, I had one or two telephone conversations with him where we discussed certain pertinent aspects, the ones I've already mentioned, primarily I think the registration provisions, and essentially I did very little. Mr. Rosen then proceeded to document the entire transaction. I was not at the closing. There was no expectation that I can recall that I would be at the closing on my part or on anybody's part that I know of. I did not receive the final draft of an agreement before it was signed, and in fact I did not receive the final draft--the final agreement as signed for some six months at least after the transaction had already closed.

Q Now, taking you back to October and November of '68, did you have any occasion to work on any earnings releases or other material sent out by Titan at that time?

A After--

MR. COOPER: I object to that, if your Honor please.

THE COURT: Well, as a matter of curiosity, what does this have to do with our case?

MR. POWERS: I am about to show in the witness's own handwriting his participation in the draft release describing the Faggen acquisition with the general earnings level of $550,000 pre-tax in or about late October '68.

THE COURT: I don't quite get this. Perhaps it is

because I'm having trouble hearing you.

MR. POWERS: I'll speak up.

THE COURT: I thought we had gotten to the point where he said he had nothing more to do with this after he did the first draft.

MR. POWERS: This question is right about the time the first draft was done. It is in the last week of October. But it is not on the subject of legal drafting, it is on the subject of an earnings release by Titan.

THE WITNESS: Excuse me, your Honor. I believe that the news release was before I did the first draft.

MR. POWERS: All right.

THE COURT: Then what you want to know is, you want him to recall a news release?

MR. POWERS: Yes, yes, because--

THE COURT: That isn't what I understood you to say at all. But, put the question again.

Q Mr. Kaufman, did you have occasion early in October 1968 to work on any publicity release which mentioned the Faggen acquisition?

A After I had negotiated--

MR. COOPER: Can I have just a yes or no answer to that, Judge?

THE COURT: I think we could properly ask for that.

A Yes.

Q What was the nature of your contact with the release?

MR. COOPER: I'll object to that, if your Honor please.

THE COURT: Again, we could avoid all this, Mr. Powers. I assume you've got some release which we can identify here and poor Mr. Kaufman won't be interrupted.

MR. POWERS: Let me rephrase the question.

Q Mr. Kaufman, did you work on a draft release which made reference to the Faggen acquisition?

THE COURT: His answer is yes.

A Yes.

Q Now, Mr. Kaufman, I show you Exhibit 7 for identification. Is this a copy of the release you worked on?

A Yes.

Q And is that your handwriting on the second page of it?

A Yes.

Q And can you fix a date when you put those notations on the second page of that exhibit?

A This was very shortly after--this was in a relatively short period after the time when the transaction was finally negotiated with Mr. Faggen.

Q Now, Mr. Kaufman, to save the time of the Court and my adversaries, would you read what your handwritten interlineation on the second page says?

MR. COOPER: I'll object to that, your Honor.

MR. POWERS: I am about to offer it in evidence.

THE COURT: Why don't you just offer it.

MR. POWERS: I offer it in evidence. Have you seen it before?

MR. COOPER: Yes. And I object to it.

THE COURT: May I see it?

MR. POWERS: Yes, your Honor. (Handing.)

THE COURT: I'll receive that for whatever it is worth.

XXX (Plaintiff's Exhibit 7 for identification was received in evidence.)

MR. POWERS: Your Honor, may I permit the witness to read into the record what his handwriting says? Because it is a little hard to read.

THE COURT: All right. I understand that. I can't read it either. Now that I see it, I agree with you.

MR. COOPER: Is your Honor aware that this was never released?

THE COURT: Mr. Cooper, one of your problems, I am beginning to find out, is that you are objecting on the grounds that you've made up your own mind as to what happened here. I don't have that privilege, you see, and I'm only here to rule on a relatively low threshhold as to the admissibility.

You seem to feel that every admissible document just about ruins your case.

MR. COOPER: No, your Honor, not at all. What I am saying is the witness has testified to something that he prepared internally and never released.

THE COURT: Fine. And you can demonstrate that it was never released. But at the moment--

MR. COOPER: No. He testified it was.

THE COURT: If he did, it was lost to me with all the lawyer objections and fussings around which we listen to in this great controversy.

Now, go ahead. Let's not interrupt any more.

You prepared this or you helped prepare it.

THE WITNESS: No, your Honor, Mr. Frank sent me--either Mr. Frank or Mr. Robinson sent me--the proposed release to shareholders, publicity release, indicating that the Faggen transaction--

THE COURT: And you suggested a change?

THE WITNESS: And I suggested a change based upon my knowledge of the transaction.

THE COURT: All right.

Q Would you please read the change into the record?

A The change that I suggested was as follows:

"The actuarial and computer companies have net

cash and liquid assets of more than $1.5 million and operating income for their most recent fiscal years in excess of $550,000 before taxes."

Q Now, was the release sent in the form that you amended it?

A No.

Q Did you have any--

A Not to my knowledge.

Q Did you have any discussion with respect to the changes in the release with either Frank or Robinson?

A No. I was not in a position of authority in the company. All I did was--

MR. COOPER: I'll object to all of the rest, your Honor.

THE COURT: The answer is no.

THE WITNESS: No.

THE COURT: Do you know whether or not this was ever released?

THE WITNESS: I believe, your Honor, that I saw the release that ultimately went out at some date later and that it was somewhat changed from this release, and I don't believe it contained the language that I had inserted.

Q Is there any other contact you had with the Harold Faggen transaction other than to what you testified through

the closing date of the transaction? Anything else you recall?

A Not specifically right now.

Q Mr. Kaufman, after the transaction was closed, did Mr. Faggen become a director of Titan?

A Yes.

Q Did you become a director of Titan at the same meeting?

A Yes.

Q Do you recall the circumstances under which Mr. Faggen was asked to become a director?

A Yes. During conversations between Mr. Robinson and myself, I was told by Mr. Robinson that a sine qua non of the transaction was that Mr. Faggen be admitted to the board of directrs.

Q When you went on the board of directors, were you appointed to any office in the company at the same time?

A No.

Q And was Mr. Faggen then the president of the actuarial division?

A I don't recall exactly what his title was. It might have been chairman and Miss Dogan might have been president. In fact, at some point around that time, that was the circumstance. But I believe that Mr. Faggen was the chief executive

officer of the Faggen actuarial operations.

Q At or about that time, did you acquire knowledge of any of the auditing work being done by the auditors for Titan with respect to Faggen operations?

A Yes. Well, the area which I frequently consulted with Mr. Faggen and with Mr. Robinson about generally was the finances and the development of Titan's earnings and that sort of thing, and I recall Mr. Faggen telling me that there would be a problem in having Titan's normal auditors audit his operations because of a possible conflict arising out of the fact that Titan's auditors had an actuarial division and Mr. Faggen was concerned that if those auditors were to examine in detail Mr. Faggen's operations that that might have some competitive adverse effect.

Q Who were Titan's auditors at that time?

A I believe Peat, Marwick, the firm Peat, Marwick, etcetera.

Q Do you know of any audit done of Faggen's earnings statements for the period of '68, '67, '66 or '65, before the acquisition?

A To my recollection, there was no such audit done.

Q Was there any audit done for those 4 preceding years after the acquisition, that you know of?

A Not to my knowledge.

Q Now, in '69--

A Other than--I'm not sure what you call an audit, other than something akin to an audit after or around the time this litigation commenced.

Q Now, in connection with your work in Titan, did you take ultimately a formal office in the corporation?

A Yes. In February of 1969, I was elected a vice president and, in April of 1969, I was elected chairman of the board.

Q I take it Ben Robinson was chairman of the board until April of '69, is that right?

A That is correct.

Q Did he continue to be a director after you became chairman?

A After I became chairman of the board, Mr. Robinson remained on the board of directors and was elected vice chairman of the board, which, as I recall at that time, was a newly created office.

Q Did the Robinson law firm continue to act as counsel to Titan during this period?

A Yes. To an increasing extent, particularly after I became chairman of the board, I employed my own law firm in Los Angeles as counsel, particularly in connection with most acquisitions. But at the same time, the Robinson firm

continued to do rather extensive legal work on a variety of matters for the Titan Group and as well as for divisions, such as for the Faggen operations.

Q Now, did Faggen continue to be a director of Titan through all this period?

A Yes.

Q In that connection, do you recall any discussions with Faggen on the subject of permitting the company's auditors, Peat, Marwick, to audit his books?

A Yes. As I indicated, Mr. Faggen had strong objections to that because of Peat, Marwick being, in effect, a competitor.

Q And what resolution of that problem was reached?

A The only resolution of the problem I can recall was that Peat, Marwick was not auditing Faggen's books and that they would apparently--I wasn't part of Peat, Marwick, but they would apparently rely on a combination of internal or whatever other internal examination was made.

Q Mr. Kaufman, state to the Court, as best you can recall, the executive responsibilities in the Faggen operations which Harold Faggen had while you were chairman of the board of Titan. First, if you can, bracket the date you were chairman of the board. You started, you said, April of '69.

A Yes.

Q When did it end?

A Approximately June of 1972.

Q And you stayed on the board after that, too, didn't you?

A For some months.

Q Now, could you state to the Court what Harold Faggen's responsibilities were in connection with his former companies?

A He was at all times, that I was familiar with, the chief executive officer of those companies and ran them.

Q What supervision was given the running of those companies by the main office of Titan, if any?

A We were essentially financially oriented, and my concern was first to obtain the best financial expertise I could, which I think I did, and to make sure that as chairman of the board I was getting accurate and complete and timely financial information from each of the operations of the company. And only when and if we spotted particular trouble spots did we attempt to inject ourselves into actual operations.

Q Did you spot any trouble spots in the former Faggen companies?

A Well, at first it was difficult to tell because I found it virtually impossible to get any information out of the Faggen companies.

MR. COOPER: Your Honor, can't we get a responsive answer from the witness?

THE COURT: I think I sympathize with you here, Mr. Cooper. In other words, again, Mr. Kaufman, don't tell us the reverse of what you are asked. Just answer the question as best you can. So why don't we use this interruption to take a brief afternoon recess, and then you can put the question again, Mr. Powers.

(Recess.)

THE COURT: Pick up with Mr. Kaufman as we discussed, Mr.Powers.

MR. POWERS: Yes.

BY MR. POWERS:

Q Mr. Kaufman, would you tell us in your own words, as best you can recall, all the conversations that you had with Mr. Faggen, either at the board of directors' meetings of Titan or elsewhere, from the spring of 1969 forward until you left Titan, with respect to the operations of the Faggen Companies, and if you can tell it to us and break it down in terms of dates and places as best you can, it would be most helpful. We would like to summarize all of those contacts you had, please.

A Okay. When I became vice president in 1969 in February, that was with particular relevance to working on

other acquisitions, and I had no particular contact other than that I was on the board by then, and I was present at board meetings at which there were various discussions, with Mr. Faggen participating. But I don't recall any particular discussions up until that time. We were in the midst of the audit. The audit was for 1968. Titan Group, as I recall, was on a calendar year and we were in the midst of that in the spring of 1969, and there were no particular discussions that I can recall about the Faggen operations.

Q Did any problems in the Faggen operations come to your attention in '69?

A Well, yes. Throughout 1969, a whole variety of problems came to my attention. When I became chairman of the board in April of '69, of course I assumed considerable additional responsibility, and then I was in the position of talking to all of the divisional executives, including Mr. Faggen, from time to time, and talking to my own financial staff who were talking to various of the divisional people.

I proposed to the board in about June of 1969 that Titan hire a person whom I had known, a Mr. Robert Johnson, to be a group vice president in charge of the insurance and actuarial operations, and I had previously introduced Mr. Johnson to Mr. Faggen, the intention being that Mr. Johnson

would serve as a go-between between my office, myself, and my staff and Mr. Faggen. I was in Los Angeles during this period of time, and Titan was still, through this period at least, headquartered in New York, and in any event the Faggen operations were in New York even after Titan's headquarters moved to Los Angeles.

As I say, I had introduced Mr. Johnson to Mr. Faggen. Mr. Faggen expressed to me in rather strong terms at one or more conversations which we had, both I think telephone calls and in person, that he did not particularly like Mr. Johnson and did not think that Mr. Johnson had adequate qualifications.

Now, notwithstanding his statements, because of my having known Mr. Johnson and his qualifications for over a decade, I nonetheless suggested to the board that Mr. Johnson be employed in that capacity. There was a very heated board meeting in or around June of 1969 at which Mr. Faggen gave a rather passionate speech denouncing Mr. Johnson, suggesting that Mr. Johnson was utterly incompetent. The only basis that I can recall Mr. Faggen stated for his opinion was that Mr. Johnson had been employed by the Diebold Company for an extremely short period of time, for something like 2 weeks or 3 weeks or some such, and Mr. Faggen stated the opinion that anybody who would be employed by the Diebold Company even for one day had to be something akin to a moron.

And that was, as I recall, the substance of Mr. Faggen's objections to Mr. Johnson. The issue was debated extensively at the board meeting and ultimately a vote was taken, and the vote was all in favor except Mr. Faggen.

Q Was Johnson--

A Nine to one or whatever. Mr. Johnson was employed clearly as head of the insurance operation and supposedly--I say supposedly because Mr. Faggen would never accept this, but supposedly also with responsibility over the actuarial operations, although Mr. Faggen seemed to suggest at that board meeting that notwithstanding the board's decision, he didn't want to have anything to do with Mr. Johnson.

Mr. Robinson was also present at all those meetings, Mr. Robinson--

Q Were you able to get supervisory people into the Faggen operations?

MR. COOPER: I'll object to the form of that question.

A I can just continue what I was saying.

MR. POWERS: Question withdrawn. I'll let the witness continue to tell the conversations his way.

THE COURT: Will you help me out, Mr. Kaufman?

Are you now at the time when you stepped down as chairman of the board?

THE WITNESS: No. Shortly after I became chairman of the board.

MR. POWERS: In the summer of '69.

THE COURT: In the summer of '69. Are you telling us that the net effect of all this was that Mr. Faggen was supplanted as the operating head of the actuarial--

THE WITNESS: No. I was trying, your Honor, to organize the executive responsibility in a fashion so as to put key subordinates to me in positions of having group responsibility, and I wanted Mr. Johnson to have responsibility for coordinating the activities of the insurance operations, which was another division, with Mr. Faggen's operations, with no intentions to supplant Mr. Faggen as the operating head of the actuarial business. Rather as a go-between, to get information, to work with him, to be a go-between between the corporate officers and the actual operations.

Q What happened after that?

A Well, I had various communications with both Mr. Johnson, over the succeeding month or two, and with Mr. Faggen, and I found almost to my utter disbelief that Mr. Faggen not only would not cooperate with Mr. Johnson but he refused to take his phone calls. He wouldn't even talk to him and give him a chance to see anything.

I finally interceded and I talked to Ben Robinson

and asked him to try to persuade Mr. Faggen to be cooperative. I even, as I recall, had an evening meeting with Miss Dogan, who was, as I say, the president of the Faggen actuarial operations, in effect the No. 2 executive just behind Mr. Faggen, and discussed with her the problems that seemed to exist, personality or otherwise, and didn't feel like anything came out of that meeting.

In addition, I tried to instruct various members of the financial staff--I did instruct them, from time to time different members--to find out what was happening at the Faggen operations, to communicate with Mr. Faggen, to look at the records, to check out the expenses, to see how much was being spent on the data processing, to determine whether the income was holding up and how the accounts were going, whether there was expansion going on or what was happening, and I received reports consistently to the effect that they could hardly find out anything because they were receiving no cooperation from Mr. Faggen whatsoever.

Q Mr.--

THE COURT: This would be, I gather, in late 1969?

THE WITNESS: Essentially from May or June of '69 through the end of '69.

Q Did you ever ask any questions of Mr. Faggen or any one in his group about the earnings in '69?

A Yes. Titan was a public company, and of course, as is the norm, we issued quarterly earnings statements to the public and those had to include earnings of all of our operations, and we would get reports from Mr. Faggen telling us what the earnings of the operation were, and it was apparent from those reports that his earnings were declining from what I had anticipated they would be, which is a level in excess of a half million dollars per year.

I discussed that with Mr. Faggen from time to time. We had in fact discussions of the earnings of each division normally at almost every board meeting. The answer that I usually received, and that Mr. Faggen gave to the board as well as to me, was that the costs of expanding the computer operations were high and that we were undertaking new hardware and computer equipment and that this was something like start-up costs for a new business, and I would say to him, "Well, but I understood we were already in this and that you had enough accounts to cover your expansion in computers and that there would be, if anything, minimum extra costs." He would say, "Well, but that isn't the case. We have to have more computers and our expenses are high," and I never got any clear indication from Mr. Faggen or any suggestion that we were losing clients or that our income was--the income side was having trouble, with one exception, which is, going back,

if I might.

Earlier I had been informed, I think around the beginning of '69, perhaps when I became a vice president and right after I went on the board, that two or three consultant employees of the Faggen operations had left and had stolen two or three clients of the Faggen actuarial operations with them and had gone to Levin-Townsend, and that Mr. Faggen had directed Ben Robinson's firm to institute suit against Levin-Townsend, according to what Mr. Faggen told me. Mr. Faggen told me these clients were really not all that important, that it wasn't important that he had lost these particular actuarial consultants, that the clients that they took with them were marginal accounts, which weren't really profitable for the company, and that the results of the lawsuit would likely be then more profitable.

And in fact, as I recall, around the summer of 1969 we settled that lawsuit with Levin-Townsend, and the financing and actuarial operations, as I recall, received a substantial amount in payment, in settlement of that transaction, and some of that, if not all of that, payment was taken into income during '69 and to some extent made the drop in earnings less precipitous.

Q Now, in connection with these discussions about the loss of clients to Levin-Townsend, did you acquire knowledge of the loss of any other clients to other companies before the

loss to Levin-Townsend?

A No. My conversations with Mr. Faggen about his business, particularly looking toward the acquisition and then after I was on the board and continued to have occasional conversations with him, was always on the assumption, on his statements to the effect that the company was growing, was adding clients, that the only thing that was stopping them from expanding further was that they did not go out looking actively for more business, that they took in just the business that came in through the door, and that they had no problem whatsoever with the loss of any accounts.

Q Now, taking you past 1969 into 1970, would you tell us all the conversations with Mr. Faggen you can recall on the subject of his operations in 1970?

THE COURT: Well, now, wait a minute. You can't quite literally mean that, Mr. Powers. I assume that he might have had a great many detailed conversations, and what do they do for your case?

MR. POWERS: Conversations which dealt with either the earnings or the accounts or the auditing of the Faggen books.

A As reports would come in from the Faggen Division, it was apparent--

MR. COOPER: Your Honor, I don't know that any of

this has any relevance to the pleadings in this case, and I assume that Mr. Powers wanted to get something in here about some alleged lulling. I don't know, when we get into 1970 and discussions with respect to earnings after a year and a half after acquisition, what that has to do with this case.

MR. POWERS: Your Honor, the spring of 1970 will be the first date that there is an audited earnings statement on the Faggen Companies with which to compare the '69 earnings, which were used to sell the deal.

THE COURT: Well, fine. But that isn't really what you asked him. And we've gotten well over the time you thought you needed to complete. So I am totally baffled.

But, in any event, I would certainly think that if you want to get into those audited statements in the spring of 1970, why, you must have them.

MR. POWERS: I am going to ask the witness about his conversations with Faggen on the subject of those and the excuses or justifications for the drops in earnings, specific conversations.

THE COURT: All right. Then we'll see what happens. Go ahead.

Q Would you tell us any conversations you remember on that subject with Mr. Faggen?

A Again, there were numerous conversations that I had

with Mr. Faggen both at board meetings and otherwise, at private meetings at his office or Titan's offices or in the course of board meetings, and as statements would come out which would indicate that his earnings were continuing to drop, his explanations to me were always (1) the large amounts being spent in the computer area, in computer development, etcetera, and (2) the general business downturn which had begun by late 1969 and 1970, when, you know, business generally seemed to be falling off, and there was no suggestion by Mr. Faggen as to any particular problems in his operations that would account for any reduction in its earnings.

Q Titan was having a lot of problems elsewhere at that time in '70, weren't they?

A Yes. The stock of Titan had fallen from approximately 15, which is where it was at the time the Faggen transaction was made, to early 1970, to perhaps 6 or 7, and there was a tremendous liquidity problem in the United States, and Titan was having an extremely difficult time raising cash to finance its operations and an extremely difficult time selling off its passive real estate in order to raise cash, because the real estate market was very difficult.

So that at that time I had relatively personally little time to spend with the Faggen operations. I was more concerned about all of the other aspects of the company.

Q When did you cease to be chairman of the board of Titan?

A I believe in approximately June of 1970.

Q And when did you leave the board of directors?

A Several months thereafter.

Q Now, up until the time you left the board of directors, did you ever charge Mr. Faggen with having defrauded Titan in connection with its acquisition?

A No.

Q Did you make any claim of fraud to any of the members of the board of Titan up until the time you left?

A No, not that I can recall.

Q When is the first time that you had a discussion on the subject with anyone in Titan on whether or not Faggen had defrauded Titan in connection with his acquisition?

A Well, that's difficult to answer because broadly speaking, as I saw the earnings drop and the problems develop, I discussed the nature of these problems with various officers of Titan, including board members, and implicit in some of those discussions must have been a concern on my part as to whether we might have been bamboozled.

On the other hand, there was no suggestion through the time I left the board by me that I can recall that I had any hard information or was making any suggestion really that

I thought that Titan Group had been defrauded.

MR. COOPER: I think that ought to be stricken. I move to strike it.

THE COURT: I am afraid technically you are right because I don't think that was the question, as I understood it, and I will so strike it.

MR. POWERS: I am almost done, your Honor. One or two more questions.

THE COURT: What I think he is trying to find out is this, Mr. Kaufman. Did there come a timeafter you left, and I gather you went back to the practice of the law after you left Titan--

THE WITNESS: Yes.

THE COURT: Did there come a time when somebody representing the then Titan management had conversations with you about perhaps making claim against Mr. Faggen for violations of 10b-5 or fraud in the inducement or whatever?

THE WITNESS: Yes.

THE COURT: When was that?

THE WITNESS: While I was still on the board in 1970 or '71--I'm losing a little track here--Mr. Frankel asked me to supply him with some information because he indicated that he was concerned about whether there might have been anything that he wasn't aware of as to why the Faggen operations

were doing so poorly.

THE COURT: You say this was in late 1970 or perhaps early 1971? Frankel was your successor, was he not, as chairman?

THE WITNESS: Twice removed.

THE COURT: In any event, was it late '70, early '71?

THE WITNESS: I think it was in '71.

THE COURT: All right.

Anything else, Mr. Powers?

Q Did you undertake to do a search of your files at or about that time?

A About that time, somewhere around then.

MR. COOPER: Early '71? I just want to get your question, Mr. Powers. Early '71?

MR. POWERS: No. I believe the investigation of the files was late '71. But I am letting the witness testify.

MR. COOPER: All right.

Q Now, in that connection, did you do a fraud investigation yourself?

A I don't know what a fraud investigation is.

Q Did you do anything other than go through your files and supply copies of documents to Mr. Frankel?

A That's all I did.

Q And at a subsequent point did you then meet with counsel for Titan who were preparing a lawsuit early in '72?

A Yes.

Q Are you being paid for appearing by Titan as a witness in these proceedings?

A Yes.

Q Are you being paid your normal law office hourly charges?

MR. COOPER: I object to the word "normal," Judge.

THE COURT: I think perhaps, since we don't know what those are, if you really want to bring this out, why don't you ask him what he is being paid.

Q What are you being paid per hour?

A $108 per hour.

Q Mr. Kaufman, did you have a dispute with Titan toward the middle and end of 1971 over the billings of your firm?

A Yes. The dispute started somewhat earlier than that. But the answer is yes.

Q Would you describe that dispute to the Court and its resolution, please?

A After I left the chairmanship and throughout the successors--the various successors to that position, and during the time while I was still on the board, there was some discussion as to whether or not our legal fees were proper, had been

the proper amount. Nobody questioned that we had performed the legal services for which the bills were rendered.

In the course of those discussions, I negotiated a settlement of a substantial portion, for virtually all of those fees, with the then chief executive officer, a Mr. Harry Rosen, who was represented in that negotiation by a then additional member of the board, Robert Doll, who was an attorney, and we settled upon a note to be given with instalment payments to my law firm for those legal fees, and I was then continued to be employed by Titan for various legal matters on the West Coast for which I billed additional legal fees, which to some extent were paid.

When Mr. Frankel became chairman of the board, after some small amounts on the notes and/or additional legal fees were paid, he raised a question, two questions basically, one as to the propriety of the amount of those legal fees and, two, as to the possible involvement in our firm in a conflict of interest situation involving a transaction with Fresno land, or land near Yosemite.

Q Did you ultimately settle that dispute?

A Yes.

Q Did you make any agreement in connection with the settlement of that dispute to appear as a witness in the case against Mr. Faggen?

A The subject never even came up.

Q Did you reach any understanding to testify in these proceedings with Mr. Frankel or with anyone else in Titan at the time you settled the disputes that your law firm was making?

A I was neither asked to make such an agreement nor was there any suggestion of that, and I made no such agreement.

MR. POWERS: Thank you.

THE COURT: 11 o'clock tomorrow morning, gentlemen.

(An adjournment was taken to Thursday, February 21, 1974 at 11:00 A.M.)

TITAN GROUP, INC.

vs. 72 Civil 1797

HAROLD FAGGEN

February 21, 1974
11:40 A.M.

(Trial resumed.)

E D M U N D M A R V I N K A U F M A N, resumed.

MR. POWERS: Your Honor, may I respectfully ask the Court's permission to ask a few more questions of Mr. Kaufman? I want to correct one factual matter.

THE COURT: All right. Go ahead.

MR. POWERS: And bring out another item.

DIRECT EXAMINATION CONTINUED

BY MR. POWERS:

Q Do you recall testifying yesterday, Mr. Kaufman, as to the dates when you left the board of Titan Group and do you wish to state anything else on the subject of the date when you left the Titan board?

A Yes. I think I--

MR. COOPER: If your Honor please, I object to the form of that question.

THE COURT: Yes. I am inclined to agree.

MR. POWERS: Let me rephrase it, your Honor, to avoid any bickering.

Q Mr. Kaufman, would you state for the Court the date you left the Titan board?

A I believe it was approximately in the spring of 1971, shortly after Mr. Frankel became chairman.

Q And will you state to the Court the date when you were asked by Mr. Frankel to make a search of your files with respect to the Faggen acquisition?

A I believe that was approximately the fall of 1971.

THE COURT: We covered this yesterday, Mr. Powers.

MR. POWERS: I think he was unsure on the dates and they were earlier.

THE COURT: That's what I have in my notes: The fall of 1971.

Q Now, Mr. Kaufman, would you state your educational background to the Court, please?

A Yes. I was a graduate with a Bachelor of Science in Business Administration from U.C.L.A. in 1956, graduate of the California Law School in 1959, member of the California Law Review. That's my educational background.

Q What was your first law firm position, Mr. Kaufman?

A I was hired in 1959 as an associate at the law firm of Irell & Manella in Los Angeles.

Q Have you been associated with that law firm ever since 1959?

A Yes, I have.

Q Are you a partner in that law firm?

A Yes, I am. I've been a partner since 1964.

Q Have you ever ceased being a partner in that law firm?

A Never.

Q How many lawyers are in that law firm?

A Approximately 60.

Q Is there a seniority ranking with respect to the partners in the law firm?

A Generally, yes.

Q What is your seniority ranking?

A I'm approximately the fifth ranking partner in the firm.

Q Can you tell the Court how many corporate acquisitions you've worked on in your years as a lawyer?

A I would say somewhere between 3 and 4 hundred.

Q And can you tell the Court the nature of the clients that you've represented in connection with this work in the acquisition field?

MR. COOPER: I object to the form of that question, your Honor.

MR. POWERS: Let me rephrase it.

Q Can you describe the clients that you've represented?

MR. COOPER: I object to that.

THE COURT: Yes. I don't think we need to get into that.

Q Mr. Kaufman, have you lectured on the subject of securities law or acquisitions?

A Yes, many times at various tax institutes throughout the country, including the N.Y.U. Tax Institute, the southwest, the northwest, the S.C. Tax Institute, the Tulane Tax Institute, various P.L.I. and New York Law Journal institutes, and others.

Q Now, Mr. Kaufman, since leaving the board of Titan, have you had occasion to review any financial or other factual materials on the Faggen companies?

A Yes, several times.

Q What is the nature of the material you have reviewed?

A I have reviewed financial data and various schedules of financials and other information that are part of the motion papers before this Court in connection with affidavits, etcetera.

Q Have you reviewed material with respect to the loss of clients in the Faggen Companies?

A Yes. I examined a schedule of lost clients.

Q Now, Mr. Kaufman, I take you back to October of 1968. Based upon the facts which you now know about the Faggen Companies, what effect, if any, would those facts have had on

your discussions as to price for the Faggen Companies?

MR. COOPER: I object to the form of that question.

THE COURT: Sustained.

Q Mr. Kaufman, do you have an opinion as to the price that you would have offered to pay for the Faggen Companies in October of 1968, based on the facts you now know about the Faggen Companies and the negotiating standards in the acquisition field which you were employing at that time?

MR. COOPER: Objected to, your Honor.

THE COURT: Sustained.

Let me advise you, Mr. Powers, very swiftly and surely that I want no roll-up opinions, particularly as after the evening recess, this is totally unnecessary.

What it really comes down to is your asking him to, after the fact, tell this Court how to decide the case in his opinion. I don't wish to criticize the witness at all, but that's totally uncalled for.

MR. POWERS: Your Honor--

THE COURT: This Court has got to decide it. I might readily change places with Mr. Kaufman, but I can't do that and I am not about to let you do it, either.

MR. POWERS: Sir, my motive in going into this area was not that.

THE COURT: I am not interested in motive. I am

telling you succinctly this is not a proper question in the context of this case, and I most assuredly think it is uncalled for this late in the examination of this witness.

MR. POWERS: The purpose, sir, if I could just state it on the record--

THE COURT: The purpose is clear.

MR. POWERS: The materiality.

THE COURT: Please, Mr. Powers. Let's not argue. I want no roll-up opinion evidence of this kind, which goes to the core of the issues in this case. I want no after-the-fact opinions by this or any other witness.

MR. POWERS: With that admonition, I have no further questions of the witness. Thank you.

THE COURT: Mr. Cooper.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Kaufman, I take it from one of your answers given this morning that you had occasion to read your deposition, your affidavits, which you made in this case prior to your testimony today?

A Yes.

Q And yesterday?

A Yes.

Q Would you keep your voice up, please, Mr. Kaufman?

A Yes.

Q And in connection with your testimony prior to your deposition, you had read the affidavits both of yourself and Mr. Frank, had you not?

A I read Mr. Frank's affidavit last quite some time ago.

Q I am thinking now as of the time you were deposed.

A Oh, as of the time I was deposed? Yes, I believe I read a draft of Mr. Frank's affidavit by that time.

Q And you had also read Mr. Frankel's affidavit?

A I believe so.

Q Now, prior to testifying now, did you have occasion to read the testimony of Mr. Frank, which he gave on deposition?

A No.

Q Did you have occasion to review his affidavits?

A No.

Q Did you have occasion to read the testimony of Mr. Frankel?

A No. By testimony, you mean under deposition?

Q Yes.

A I may have glanced at it. But, if I did, it was quite a while ago.

Q Did you have occasion to read Mr. Faggen's deposition?

A Only parts of it.

Q Do you know which parts?

A I just glanced through it and leafed through parts of it. The things that looked interesting to me, I read.

Q When was that done?

A This week, within the last 3 or 4 days, primarily I believe to some limited extent on Monday evening and to some limited extent on Tuesday.

Q Did you read the proposed findings of fact and conclusions of law that were submitted here by both parties?

A No.

Q You heard my opening statement the other day? You were in Court, weren't you?

A Yes.

Q Now, in 1969 and 1970, Mr. Kaufman, from what you testified to yesterday, I think you suggested that in that period of time you felt that Mr. Faggen was not cooperating with you, is that correct?

A That is correct.

Q During that same period of time, Titan was undergoing a very severe liquidity crisis?

A Yes, that is correct.

Q What part did the Yosemite acquisition play in that crisis?

A I think a very substantial part. Titan had put a significant amount of dollar investment into that project

without having recovered any or virtually any of it.

Q As a matter of fact, in 1970 it tried to take a $2,600,000 write-off for that loss, didn't it?

A I recall some such number.

Q And that was while you were chairman?

A That is correct.

Q Did Mr. Robinson have anything to do with that gem of an acquisition?

A He was the chairman--

MR. POWERS: Object, your Honor, to that type of question.

THE COURT: I would ask Mr. Cooper to restate the question.

Q Did Mr. Robinson have anything to do with the Yosemite acquisition?

A Yes.

Q He brought it to Titan?

A No.

Q Who brought it to Titan?

A Mr. Richard Gunther.

Q Did you represent Gunther?

A Me, personally?

Q Your firm.

A Yes. In a limited capacity, as tax counsel.

Q As a matter of fact, it was your representation of Gunther by your firm that gave rise to Mr. Frankel's claim against your firm in 1971, isn't that so?

A I don't know what was in Mr. Frankel's mind.

Q Well, weren't you told at the board meeting in May of 1971, when you made application for your legal fees, that there was a claim against you and your firm for the activities which you had had in the Yosemite acquisition?

A I was told that there was consideration being given to making a claim and that before such a claim would be made that Titan's board wanted additional information from us. They wanted us to answer a variety of questions propounded to us so that the Titan board could determine whether such a claim should be made.

Q You knew at that time, didn't you, that you were then in a dispute with respect to your fees with Titan that had arisen as the result of your representation of the Gunther group in the Yosemite transaction?

A No. I don't recall any dispute as to our fees which arose out of our representation of Mr. Gunther, and in particular, we did not represent Mr. Gunther in the Yosemite transaction.

Q Well, without having Mr. Gunther in the Yosemite transaction, you knew that your fees were being questioned because

of your activities in the Yosemite acquisition, isn't that so?

A I knew that there were two questions, if you characterize them as such, that were being put to me simultaneously and that in that sense they were related, but I did not know that one arose out of the other.

Q You didn't know that one arose out of the other?

A Yes. The question as to my fees seemed to revolve around the question as to whether they were fair fees given the fact that some of the work was done at a time when I was on the board and an officer of Titan, and therefore there was a question raised as to the reasonableness of the amount of those fees.

Q By the way, your firm had received several hundred thousand dollars of fees during the period 1969-1970, hadn't it?

A I would say during the period 1968 through '70.

Q Well, did you receive any fees other than the $4,500 fee that you got on the Faggen acquisition in 1968?

A I don't recall. I haven't reviewed our schedule of legal actions.

Q Well, in any case, between the time that you became a director, in December of 1968, and the time that you left your chairmanship in July of 1970, there were several hundred

thousand dollars of fees, correct?

A That is correct.

Q Now, these fees were being collected by your firm during the same period of time that Titan was going through this liquidity crisis?

A That is correct.

Q Do you recall in your status report of July 1970 you were pointing out to the board the severe liquidity crisis that had been developing during the period of your chairmanship, isn't that so?

A That is correct. Excuse me, Mr. Cooper. I'm accepting your characterization or your use of the words, "liquidity crisis." I'm not sure that you necessarily mean the same thing by those words that I would mean or did in fact mean at that time.

Q Well, I am reading to you from the minutes of the meeting of July 15, 1970. First of all, I show you this and ask you if you saw this.

MR. POWERS: Shouldn't we have that marked, Mr. Cooper?

MR. COOPER: I am going to, yes.

(Pause.)

A I believe I've seen this.

MR. COOPER: I offer it in evidence, your Honor.

MR. POWERS: No objection, your Honor.

(Defendant's Exhibit A was received in evidence.)

MR. POWERS: Your Honor, at this point would it make sense for me to move that all affidavnts and all exhibits to them that have been submitted in the case to date in the motion for summary judgment and thereafter shall be deemed part of the record in the case, and would this then be convenient for reference from this point forward?

THE COURT: That is perfectly agreeable with me as long as it is acceptable to Mr. Cooper as well.

MR. COOPER: My difficulty with that is that I may waive cross examination by doing that and that's precisely what I don't want to do with respect to certainly one witness in there, and that is Mr. Hatcher, if he is going to appear.

THE COURT: Oh, no. I think maybe you and I misunderstood what Mr. Powers is saying.

I think he is offering to stipulate that all documents other than affidavits--

MR. COOPER: In that case, I am perfectly willing to agree.

THE COURT: --be deemed part of the record.

MR. POWERS: I'll go further and stipulate that all affidavits of all parties who made affidavits who appear at

this trial shall be deemed part of the trial record.

Mr. Hatcher doesn't work for Titan any more, so he is not going to appear, and there will be other live witnesses on that issue. But the affidavits of everybody else who is going to appear should be made part of the trial record.

THE COURT: So, in other words, you would exclude Hatcher?

MR. POWERS: Yes. But all of the exhibits and all of the other affidavits come in.

MR. COOPER: I have no objections to that, Judge.

THE COURT: All right. Then we'll so regard the situation in view of the stipulation.

BY MR. COOPER:

Q Now, Mr. Kaufman, you previously read this, haven't you, this exhibit?

A Which one?

Q Exhibit A in evidence.

A What is that? The minutes you just handed me?

Q Yes.

A I believe I probably read it at one time.

Q Take it and let's be sure. (Handing.)

In July of 1970, didn't you report to the directors of Titan that Faggen operations were profitable for that year?

MR. POWERS: Objection, Mr. Cooper. You gave the

witness something to read and he is trying to read it.

Q Take a look at page 2. I direct your attention to page 2.

MR. POWERS: Fine.

A You are talking about page 2 of the exhibit attached to the minutes, not the minutes themselves. You don't mean the minutes themselves.

Q I'm talking about this page.

A Oh, this one? Of the minutes.

(Pause.)

Well, by implication, I said what you said. I said, and I quote: "He did not think," meaning me, the chairman, "that the Faggen Companies would be able to make enough profit to pay the interest on the debentures."

Q I understand that. But they were profitable, weren't they?

A In the sense that they were apparently making some profit, yes.

Q Did you know how much?

A I probably knew at the time.

Q You haven't gone over any financial information as to what the Faggen Companies earned in '69 and '70, did you?

A Oh, yes.

Q Prior to testifying?

A Prior to testifying, yes.

Q But before we leave that exhibit, you stated that were it not for the expansion into data processing, they would have been more profitable, isn't that so?

A Well, I'll read what I said: "He qualified this statement by stating that the Faggen organization's decline in earnings was attributed to the decisions to invest in that organization's future in the data processing area."

Q And this followed an April 1970 estoppel letter which was issued by Titan on the Faggen notes, was it not?

MR. POWERS: Object to the form of that question, your Honor. Whatever the letter is, it is. If he wants to put it in evidence--

MR. COOPER: It is in evidence now, your Honor. It is part of the appendix. Your Honor, on page 111-A and 112-A of the appendix, there are references to the estoppel letters.

Q I show it to you, Mr. Kaufman, and ask you if you recall these estoppel documents being sent out.

A I have since heard of this having been sent, although I'm not sure I heard it in the form of an estoppel letter. I don't offhand know what an estoppel letter is.

Q Well, read it.

A Yes. I've read it. I did not either sign that letter,

nor do I recall discussing it before it went out. And as to when I learned that it went out, it was sometime, I believe, after it was sent, as far as I can recall. It doesn't stand out in my mind as having been something that I ever personally attended to.

Q I'm reading from page 500 of your deposition, Mr. Kaufman.

"Q Are you aware that on April 10th of 1970, Titan issued an estoppel certificate on a $1.5 million worth of notes?

"A I don't know the date. I understood that such a thing happened. Yes."

Do you recall that question being asked and that answer being given?

A Yes. It strikes me as what I just said.

Q Well, in any case, you knew it at or about the time of the issuance, didn't you?

A I may have known it about the time or shortly thereafter, somewhere around that time.

Q During the period of 1969 and 1970--withdrawn.

In 1969, were you instrumental, did you participate in the acquisition of the Sovereign Construction Company, which was Mr. Frankel's company?

A Yes.

Q And during 1970 and during 1969, do you recall that Mr. Faggen's companies were called upon for cash for Titan?

A --

Q Let me rephrase it. Are you aware, Mr. Kaufman, that in 1969 and 1970, the Titan, the Harold Faggen Actuarial Company, turned over to Titan $750,000 in cash?

A I can't answer that question yes or no, Mr. Cooper. I'll try to give you as accurate an answer--

Q No, if you can't answer it yes or no, that is sufficient for me at the moment.

Are you aware--reading from 240 and 241-A, Mr. Powers--are you aware, Mr. Kaufman, that a Mr. Daniel Hatcher, who had been an officer of Titan, had submitted an affidavit in this Court in which he says, "Titan apparently received a total of approximately $750,000 in cash in 1969 and '70 after it was operating the Faggen Companies as wholly owned subsidiaries of Titan."

Are you aware of that?

A Am I aware that he said it in his affidavit?

Q First, let's do it that way. Are you aware that he said it?

A Yes.

Q Are you aware that it was done?

A I told you I can't answer that yes because there are

implications in your question which suggest something other than the true facts.

Q Just answer my question yes or no. Was it done?

MR. POWERS: I object to the tempo of this questioning and to the hectoring tone that my colleague is now taking.

THE COURT: Well, let's not be too overly concerned about that. What I am really interested in is in hearing what Mr. Kaufman knows about this.

Let's go back.

As I understand it, Mr. Kaufman, are you saying that you never knew that Mr. Hatcher said this in this affidavit?

THE WITNESS: Oh, no, no. I read Mr. Hatcher's affidavit, your Honor, and I am aware that he said approximately the quoted words.

THE COURT: Well, now, aside from what Mr. Hatcher said, do you know of your own knowledge whether or not Titan received about $750,000 in cash after it was operating the Faggen Companies as subsidiaries and generally speaking within the two years, '69 and '70?

THE WITNESS: Your Honor, when we acquired the Faggen Companies, it had a substantial amount of liquid securities, Treasury bills, Triple-A Bonds and the like, and it was understood that they would liquidate those securities as fast as possible so as to have that cash available to Titan.

Now, I believe that in the months after the acquisition was made and to some extent, or perhaps entirely, during the time that I was chairman, we proceeded to liquidate many of those securities and to utilize the cash in Titan's operations.

Now, I don't recall whether the securities were removed and sold by Titan, whether they were first sold by Faggen and the cash remitted. All I'm really saying is that Faggen did not have that kind of cash when we acquired them or at any time other than through the liquidation of the securities, which we caused to be liquidated.

THE COURT: Let's see if we can cut through all of this. My question simply is, from whatever source, whether it be by sale of securities or whatever, did the Titan company receive approximately $750,000 in cash or other assets during the two years in question, 1969 and '70?

THE WITNESS: I believe so, your Honor, somewhere in that neighborhood.

THE COURT: Further, I would like to know, do you have any knowledge as to whether or not Titan later received another sum of about $183,000 from out of the Faggen Companies?

THE WITNESS: I may have had knowledge at the time, your Honor, but I don't recall the exact dollars that were in fact received. That sounds to me like very reasonable.

THE COURT: I am reading from the Hatcher affidavit, I'm sure you understand.

THE WITNESS: Yes.

MR. POWERS: Your Honor, I still stipulate that whatever factual statements are contained in the Hatcher affidavit on numbers are conceded facts here, and there is no issue between the lawyers on that subject.

MR.COOPER: Your Honor, there may be some issue.

THE COURT: Well, in any event, you are not bound by this. He is only saying he offers to stipulate. But forgive us for interrupting. Let's go on to something else.

BY MR. COOPER:

Q Mr. Kaufman, are you aware that Mr. Hatcher said in his affidavit that Titan got, in addition to the $1,300,000 in securities which Titan took right after acquisition, an additional $933,000? Are you aware of that?

A On top of the--

Q On top of $1.3 million.

A No, I don't recall that. If it is there, then I read it. But I don't recall that.

MR. POWERS: Your Honor, I object to an inquiry which is supposedly based on the Hatcher affidavit which is misstating the amount. The Hatcher affidavit said Titan acquired a total of no more than a $1,075,000 in securities. It

doesn't say a million three. So he is assuming a fact contrary to the affidavit he is apparently quoting from in his question.

MR. COOPER: I am not assuming any state of facts apparently contrary. I am only asking him whether he knew that there were securities which were taken at the time of acquisition, were converted to Titan's use, and in addition to those securities, the value of which I think everybody will concede very shortly was a million three, in addition to that, there was another $933,000 taken out.

A Are you asking me whether I was aware that in fact there was approximately $2,200,000 removed from the Titan Companies?

Q Precisely.

A Then the answer is no.

Q All right. You knew about one million three when you took it over, didn't you?

A No. I thought I knew the approximate amount of liquid securities that Titan operations had, and a million three sounds to me like certainly a ballgame figure.

Q You even testified to it, didn't you? Didn't you testify in your deposition that there was a million three in securities?

A I said that sounds to me like approximately the number.

Q And there are attached to these affidavits, Mr. Kaufman, on Mr. Faggen's affidavits, receipts signed by Mr. Russo. You remember him, don't you?

A Yes.

Q He was working for Titan at the time?

A Briefly, while I was there.

Q And he was one of the financial people, wasn't he?

A Yes, sir.

Q And there are receipts here--I refer you to Exhibit H, page 101 to 110, of the receipts for all of the securities received by Titan, which have been evaluated at approximately $1,300,000?

MR. POWERS: Objection.

Q Inclusive of Treasury bills which were received at the same time.

MR. POWERS: I object to the form of the question. He is again referring to a schedule. There is no evaluation on that schedule. This whole issue here is the difference between valuing the securities as at September 30, the cut-off date for the closing, which gives a $1.1 million valuation and the $1.3 million which he would like to put on it. And the exhibit he is quoting from in the question doesn't have a value in it, your Honor.

THE COURT: I can't answer that because I don't know

what he is quoting from.

MR. POWERS: It is starting 101-A through 110-A of the binder which your Honor has before him, and that is an inventory of the securities.

THE COURT: Well, in any event--

MR. POWERS: There is no value in it.

MR. COOPER: Judge, I'll establish the value. All I wanted to get from him is the fact that these securities were turned over and that he had appraised that during the course of negotiations of $1.3 million.

A I did not appraise anything during the course of negotiations. I merely looked at schedules.

Q I show you this, Mr. Kaufman, and ask you if you saw this auditors' report for the Faggen Division for the period in question, dealing with the valuation of those securities?

(Handing.)

MR. POWERS: I object to handing the witness an unmarked document, characterizing the document in the question, and then asking the witness to answer it based on that characterization. There is a procedure for marking a document, showing it to the witness.

If you want to introduce it, then we'll look at it and see if it is proper evidence. I object to his doing that, your Honor.

THE COURT: I'll deem this as Defendant's Exhibit B for identification. But whatever the characterization, Mr. Kaufman, do you recall ever seeing this before?

THE WITNESS: I can't tell, your Honor. During the course of my association with Titan, I saw perhaps hundreds of financial statements from divisions and this is a typed financial statement, and I may have seen it or I may not have seen it. I really don't recall.

I don't know what this is other than that it is a typed financial statement of the Faggen Divisions. I don't know who this was prepared by, whether it was given to the Titan officers, whether it was prepared by our Titan Groups' own financial staff. I don't know.

Q By the way, Mr. Kaufman, in addition to having a law degree, you also took and passed the examination for a C.P.A., didn't you?

A Yes, sir.

MR. COOPER: May I mark it for identification?

THE COURT: Defendant's Exhibit B for identification.

XXX (Defendant's Exhibit B was marked for identification.)

MR. COOPER: May I call upon counsel, in connection with our subpoena, for counsel to verify this exhibit against the financial records which we have subpoenaed in this

case? Would you please verify that against your financial records which were under subpoena?

MR. POWERS: I have no way of verifying this against financial records in this Court today. I didn't know which financial records you wanted. Whatever it is you would like me to do with it, maybe I can stipulate.

MR. COOPER: Is that a fair and true representation of the financial statement on the Faggen Divisions as of the date which appears on there?

MR. POWERS: Who prepared this?

MR. COOPER: Submitted to Titan by Titan's auditors.

MR. POWERS: I've never seen this before and I have no way of answering you.

MR. COOPER: All right. Then, if you can't by the next time you return, can we have that verified against Titan's financial records? They are under subpoena.

MR. POWERS: Can we have a copy of this so I can have something to work on?

MR. COOPER: All I want verified at the moment is just the valuation of securities.

THE COURT: But he says he can't. So let's not debase that further. I will ask that you both try to check this out. There must be some way of doing it. But it can't be done at this very moment.

What is the date represented on that, Mr. Powers?

MR. POWERS: It says Faygen Division, Individual and Combined Balance Sheet, December 31, '68, at September 30, 1968.

THE COURT: All right. Let's move along.

BY MR. COOPER:

Q Do you remember these questions being asked of you and these answers being given, Mr. Kaufman, page 439:

"Q I don't want to go over ground we covered last time. Specifically, what I'm getting at in my questions to you now, Mr. Kaufman, is that the purchase price which you finally agreed upon was $5.5 million.

"A In convertible subordinated debentures.

"Q But you immediately got $1,300,000 out of those companies.

"A More than that, I thought.

"Q Immediately? You did later on.

"A I don't recall the exact number.

"Q You got $1.3 million out of those companies and the securities which you acquired.

"A I was well aware of that."

Did you make those answers to those questions?

A Yes, sir.

Q All right.

MR.POWERS: Your Honor, May I respectfully ask Mr. Cooper to read into the record the next question and answer, which makes what was just read not misleading, to save me the time of doing it on redirect, while the Court's attention is directed to that particular page of the deposition? I think a misleading excerpt has been read by leaving out the next question and answer.

THE COURT: That is up to Mr. Cooper. If he doesn't want to read it, you can read it later.

MR. POWERS: Thank you.

(Pause.)

MR. COOPER: The next question is what you want me to read? Line 12? Is that what you want me to read?

MR. POWERS: 12 through 18.

MR. COOPER: Oh, no. If you want to, you can read that.

Q Mr. Kaufman, were you aware that Titan's annual report for 1968 showed an operating loss of $102,000?

A Well, whatever it showed, I was aware of it at the time.

Q Well, you've reviewed the financial information just before you came to Court, you said that?

A No. I didn't review Titan's annual report for 1968.

Q All right. Here you are. Take a look at it first.

Then I'll offer it in evidence. (Handing.)

A I'm sorry, but what was the question?

Q Was there an operating loss in 1968 reported of $102,000?

A I don't see that. No.

Q What is the operating loss?

A It seems, if I read this correctly, it seems to me--you are using the word "operating." That word isn't used in here particularly as I look at it quickly. But the income before extraordinary items was $2,809,000. That is the positive number. Then there were some extraordinary items, provisions for reserves for decline in market values of assets, coming down to a net income of $1,356,000.

Q Are you reading from the same thing I am reading from?

A This is the one you gave me. Here is 1968: Income Before extraordinary items, $2,809,000.

Q You are reading from the '68. All right.

Now, I show you, and hold on to this, the 1969 report and ask you if on the '69 report it shows $102,000 net operating loss. From operations for 1968.

MR. POWERS: Didn't you mean '69?

MR. COOPER: No. For '68.

A For '68. Oh, yes. That's what this report shows.

Q Okay. That's the 1969 report showing both '68 and '69.

A Yes. Retroactively pooling in post'68 transactions.

Q Okay. You mean '68 transactions.

A No. Post-'68 transactions.

Q What does it show for 1969 operations?

A An income from operations before Federal income taxes?

Q Yes.

A Of $3,529,000.

MR. COOPER: I offer the '69 report into evidence.

MR. POWERS: No objection.

XXX (Defendant's Exhibit C was received in evidence.)

THE COURT: This is the 1969 annual report?

MR. COOPER: Yes, your Honor.

Q Were you aware, Mr. Kaufman, that so far as the Faggen Company divisions were concerned that for the year 1969 their gross income was $1,068,811?

A For the full year 1968?

Q Yes.

A I don't know if I was ever aware of that exact figure. I was aware that their gross income was in the range of a million dollars.

MR. POWERS: Objection. I move to strike both the

question and the answer because it is misleading. I think Mr. Cooper was saying gross revenues. He said gross income and the witness nodded his head and said yes, gross income of about a million dollars. So we have a misleading question and an inaccurate response.

MR. COOPER: I am looking for gross revenues.

A Gross revenues is what I intended.

Q You were aware that there were gross revenues in the Faggen Companies in '68 of a $1,068,811.

A Yes, approximately.

Q Do I recall you testified yesterday, Mr. Kaufman, that the earnings of the Faggen Companies had declined after they became part of Titan Group?

A Yes. That's my recollection.

Q Did I also understand you to testify that the level or volume of business had fallen off after the Faggen Companies had become part of the Titan Group in '69 and '70?

A No. I talked, I believe, about loss of clients. I don't recall whether I specifically had in mind whether the gross revenues as a number had or had not declined. In other words, I knew that expenses had gone up and certainly there were some revenues being produced, or I assumed there were some revenues being produced from the data processing operations, which may have been loss contracts for all I know.

I mean I don't know. But I don't recall specifically answering the question as to whether that number, the gross sales or revenues, had or had not--

Q In other words, what you are saying is, in answer to Mr. Powers' questions yesterday about a possible loss of clients, and as a matter of fact even this morning some questions were attempted to be elicited, you didn't mean to infer from that that there had been any loss of revenue if there had been any loss of clients, did you?

A Oh, there was a loss of revenue if there was a loss of clients, actuarial revenues.

Q Is that what you meant to infer?

A Certainly. A loss of revenue means a loss of clients. As to whether or not the revenue lost from a loss of actuarial clients was compensated for at the gross sales line by additional revenues from some other source, I don't know, but I do know that a substantial part of the both revenues and bottom line for 1969 were from the settlement of a lawsuit with Levin-Townsend, were in my mind discounted as being, you know, in settlement of a lawsuit and not the normal--

Q That settlement amounted to some $260-odd thousand, right?

A That seems to be it.

Q Are you aware that revenue for 1969 was $1,204,341?

A Including--

Q Including the Levin-Townsend? I'm sorry. Without Levin-Townsend. I'm sorry. Without Levin-Townsend. Are you aware of that?

A No.

Q That is just from fees.

A No.

Q You are not aware of that. Are you aware that in 1969, in addition to the revenues from fees for the actuarial division, there was a $35,000 payment, which was the amount which Mr. Faggen was paying into the Faggen operation from his professional accounting fees?

A No, I didn't know that much of the specifics.

Q Then you don't know that the total amount which was received in that year was $1,204,000 exclusive of the Levin-Townsend settlement, do you?

A I presume inclusive of computer services as opposed to the actuarial services.

Q I'm talking now only of the Faggen Divisions' gross income.

A Yes. But that would have included to an increasing extent--

Q Gross revenue. I'm sorry.

A --the data processing services, as well as actuarial

services.

Q Okay. Are you aware that in 1970 the gross revenues were $1,366,000? For 1970, from fees and retainers?

MR. POWERS: I am going to object to this whole line of inquiry where he states very complex figures as if they are matters of fact and puts them on the record so that they take on some evidentiary connotation when he is not supplying any financial exhibits to establish them, and then asks the witness was he aware of them as if whether he was aware of them or not they are true and they are facts that should go into the tryer of facts' consideration of the issues here. If he wants to put in exhibits on these and then ask questions, I have no problem.

THE COURT: Well, I would certainly suggest that I agree with you in part. I can't imagine this witness has total recall of these figures, Mr. Cooper.

MR. COOPER: I don't expect him too, your Honor. The purpose of this question was that the witness already testified yesterday about a loss--

THE COURT: No, no. I understand that point perfectly. We've driven that home with a pile driver. But I'm only commenting on the objection of your opponent, and I think a lot of time could be saved from your viewpoint if you want to get him to identify some of these financials, and

either use them to refresh his recollection if that's what you want or else offer them in evidence.

MR. POWERS: My problem is I have reservations over the accuracy of his statements without seeing a document.

THE COURT: Mr. Powers, rather than argue with the Judge, did you hear what I said?

MR. POWERS: Yes, sir.

THE COURT: I suggested that he use the documents.

MR. COOPER: Your Honor, I can perhaps expedite this. I have what are ledger sheets from the Faggen Companies for the periods in question, worksheets, rather, and during the lunch hour, perhaps Mr. Kaufman can look these over.

THE COURT: I had thought that you would agree that we would finish Mr. Kaufman before lunch, Number One, and, Number Two, if these are documents which he hasn't even seen before, then my idea I think comes apart at the seams.

MR. COOPER: Judge, I don't know whether he has seen them before or not. I think they were reports which were sent to him.

THE COURT: Well, be that as it may, we are just wasting an awful lot of time, and I rather think that it is becoming clearer and clearer that we are doing no more than that.

Why don't we get on to something else that he does

know about.

MR. COOPER: All right, Judge.

Q Mr. Kaufman, between May of 1971 and the fall of 1971, there is no question that you were in a dispute with Mr. Frankel regarding your fees, was there?

A There was no question.

Q And there was also no question that in that period of time, Mr. Frankel was making claim against you in connection with activities that you had conducted in the Yosemite transaction, isn't that true?

A Well, I don't mean to sound evasive in any respect, Mr. Cooper, but as a lawyer, I'm reluctant to answer that question yes or no because when we discuss a potential claim, I don't consider that as a claim made against me. There was a discussion of whether or not a claim might be made, and various questions were propounded which I and my firm answered. And no claim was in fact made.

Q Generally, leases were exchanged, weren't they?

A Of course.

Q And you were holding some notes of Titan for fees and you had bills for fees at the time, didn't you?

A That is correct.

Q And the total came to $133,000?

A Yes.

Q And--

A Approximately.

Q All right. Now, then, at the time that you had this outstanding claim for your fees, do you recall that you sat down with Mr. Frankel sometime in September of 1971, and at the same meeting at which he discussed his claim against you for Yosemite and you discussed your claim for fees, there was a discussion with respect to his potential claim against Faggen?

A I don't recall whether or not all of those items were discussed in the same meeting, as you put it, nor do I recall what meeting you are referring to. I had numerous meetings with Mr. Frankel in Los Angeles as well as in New York, and also numerous phone conversations as well as conversations with other members of the board, and I recall that during the approximate fall of 1971, I was asked to examine my files and I was aware that Titan Group was interested in at least investigating whether it might have a claim against Faggen. And that occurred during or contemporaneously with part of the discussion over our fees and the Yosemite item.

Q Do you recall this question being asked of you and this answer being given, page 97:

"Q In the course of discussing the potential litigation and the settlement of it, Mr. Frankel also

raised the question with you about the pending claim against Mr. Faggen, isn't that so?

"A Apparently so, although I have no clear recollection of it. In fact, I have no recollection that he did. But he may have."

Do you remember that answer being given?

A Yes. That sounds approximately correct. But in the course of it, what I understood you to mean is during the time and during those discussions the Faggen matter was raised.

Q Yes.

A Okay. Well, I thought your question was whether at a particular meeting that these two things were mentioned and this was also mentioned. I don't recall any particular thing.

Q Mr. Kaufman, in 1969, you became chairman in April?

A Yes.

Q Vice President in February?

A As I recall.

Q I show you this paper, and I ask you if you recognize this as the Titan proxy statement for 1969? (Handing.)

A Yes, sir.

MR. COOPER: I offer it in evidence.

MR. POWERS: No objection.

XXX (Defendant's Exhibit D was received in evidence.)

Q Mr. Kaufman, as chairman of the board, did your law firm prepare that proxy statement?

A I don't recall. In May '69, it is very likely. We certainly reviewed it.

Q Were you aware of the language in the proxy statement, Mr. Kaufman?

A You mean at the time it was prepared?

Q Yes.

A I would think so.

Q And did you see in that proxy statement, as one of the notes to the proxy statement, on page 3--

A One of the notes to the financial statement?

Q No, the proxy statement. The footnote, page 3, there appears this statement:

After describing the number of notes given to Mr. Faggen: "The amount of convertible notes delivered to Mr. Faggen was arrived at as a result of arms-length negotiations between the parties, with each side separately represented by counsel, based upon the financial condition and past earnings history and after a thorough investigation of the business and assets of the companies acquired from Mr. Faggen."

Now, at the time that that was prepared, did you raise any objection to that language being put into that proxy statement?

A I don't recall having raised any objection.

Q Mr. Kaufman, at the time that you first met Mr. Powers, that was in April of 1972, isn't that so?

A That sounds approximately correct.

Q You had never seen, prior to that meeting, the exhibit which is attached to the complaint, and which we've designated as the pro forma and which is marked in evidence on this case as Exhibit 3, prior to that date, had you?

A I would have to see what it is you are asking me whether I had ever seen.

Q This. (Handing.)

A No, I don't recall ever having seen this.

Q Now, then--

A This specific typed version in this exact form.

Q You had never seen--not only hadn't you ever seen that, Mr. Kaufman, which is the exhibit attached to the complaint, but you had never seen a 4-year presentation, had you?

A I think I had seen prior tax returns, and I think I had been told what the numbers were for prior years, and whether I had seen a 4-year presentation prior to the time of my meeting with Mr. Powers, I think I probably had prior to that time in some form.

Q Had you ever seen anything prepared by Mr. Faggen of a 4-year presentation?

A Well, what I would have seen would have been normally typewritten financials, and I wouldn't have normally known who prepared them as opposed to who put the data together for them to be prepared.

Q Well, in any case, Mr. Kaufman, the particular subject that we are talking about, which is Exhibit 3 in this case, you had never seen prior to April 1972.

A I don't recall having seen it. And if I had seen it, it just didn't stand out in my memory.

Q All right. And you looked at the draft of the complaint, which was in Mr. Powers' possession when he first saw you, didn't you, in Aprio of 1972?

A I think so.

Q And I believe you testified that the complaint accorded with your recollection, didn't you?

A I don't know what you mean by "the complaint accorded with my recollection."

Q Didn't you testify at page 23 of your deposition that when you saw the complaint, it accorded with your recollection?

A Well, I think what I testified to was that the matters alleged inthe complaint were either consistent with my recollection or that certainly I couldn't say they were inconsistent.

Q All right. Let me read you this question and answer.

"Q Did you make any observation with respect to whether any of the contents of that complaint accorded with your recollection or didn't accord with your recollection?

"A Yes, my observation was that a substantial part of the contents of the complaint were in accord with my recollection.

"Q Did you state that any part of it was not in your recollection?

"A I don't believe so. There were parts to which I had insufficient knowledge to render an opinion on.

"Q Do you know specifically what they were?

"A I would have to review the complaint and see. But I don't recall reading anything with which I took issue or I thought the facts were otherwise."

Do you recall those questions being asked and that answer being given?

A Yes. That's what I just said.

Q Now, Mr. Kaufman, when you took a look at that, one of the items you had to see was Paragraph 11 of the complaint, wasn't it, which said, on page 10-A of the appendix, "The net asset value of the Faggen Companies was as of the date of acquisition no more than approximately $1.2 million, and as a direct result of the false and misleading selling

memorandum relied on by Titan," etcetera, etcetera.

You knew when you looked at that that you had taken out $1.3 million in assets not necessary for the operation of the business at the time of acquisition, didn't you?

A I don't put those two together as being (1) either in conflict, or (2) at the time I first met with Powers, I had not reviewed my files in the kind of detail that I have since, and my recollections in some areas were nowhere near as clear as they are now. But, I don't even read those two things as being in conflict.

Q In other words--

A And by the time we withdrew assets from the Faggen operations, he had been a part of Titan Group for some time, had accumulated some additional monies, the stock market values had changed on his securities. We didn't sell many of the securities for months after the acquisition was made. The dollars we withdrew were not necessarily in precise relationship to values that were present six months previously.

Q Mr. Kaufman, all I asked you was the statement that appears in the complaint was, "the net asset value of the Faggen Companies was, as of the date of acquisition," not months later or anything else, "no more than approximately $1.2 million." And you knew that as of the date of acquisition, you had securities which were not necessary for the

operation of the business of $1.3 million, didn't you?

A I don't know how to answer that because I don't see those two as being in conflict.

Q Mr. Kaufman, one of the reasons for acquiring the Faggen Companies was because of the fact that Titan did not have a good cash flow position in 1968, isn't that so?

A That probably was present as a reason, among many others.

Q And you had meetings with Mr. Block in California back in the summer of 1968 with Mr. Frank, didn't you, discussing the Faggen acquisition?

A Yes.

Q Before you even met Harold Faggen?

A Yes.

Q And you knew, when you were discussing with the Block group, that there was a $1.3 million pool of securities of liquid assets that you wanted to get ahold of in this acquisition, didn't you?

A I think at that time all I knew was that the Faggen operations were profitable and had a significant net worth. I don't think I knew the details of any pool of securities and I don't believe, when I discussed with Mr. Block, that either of us ever mentioned--I can't recall a mention of the fact that we would like to get ahold of $1.3 million or any

number of securities. I certainly wouldn't pay $5.5 million for $1.3 million in securities.

MR. COOPER: I move to strike.

Q Just answer my questions, please, Mr. Kaufman.

Mr. Kaufman, when you met with Mr. Faggen on September 6, I believe you testified yesterday that that was the occasion on which Mr. Faggen had handed you a paper, which is marked in evidence now, and on which these various figures, I believe it is Exhibit 1--that those papers were handed to you on the date of September 6?

A I thought they probably were. I wasn't--I didn't specifically recall whether I received them precisely on that day or shortly thereafter. But I thought, my best recollection is, that they probably were handed to me on that date.

Q Do you recall your testimony, Mr. Kaufman, at page 229:

"Q Was the exhibit designated Exhibit 40, your affidavit"--which is the same as Exhibit 1 here in this case--"given to you at your meeting?" Referring to the meeting of September 6.

"MR. POWERS: The question has been asked and answered.

"A At or prior. I think so.

"Q I want to get it done.

"MR. POWERS: You are talking about the second meeting now.

"MR. COOPER: The first meeting.

"MR. POWERS: The testimony before was that the adjustment sheets to the income tax return was given either between the first and second meeting, or at the second meeting. I don't recall.

"THE WITNESS: Maybe earlier. I think between."

Do you recall those questions being asked and that answer, those answers being given?

A Generally.

Q So, as of the date of the deposition, your testimony was that the exhibit was given you between the first and the second meeting, isn't that so?

A I think my testimony was that it may have been given to me at the first meeting. It is likely, or I think it was given to me between the first and the second meeting.

Q Well, at page 230, Mr. Kaufman, you go on to say:

"But the substance of it was known to me in the first meeting, the substance being the bottom line.

"Q The bottom line with respect to what Mr. Faggen wanted for the deal?

"A No. The bottom line with respect to what the alleged earnings of the Faggen Companies were, as well as

what Mr. Faggen wanted for the deal."

Now, did that refresh your recollection that you had no document in front of you on September 6 and that all you had were bottom line numbers on that date?

A No. It refreshes my recollection that I either had the document on September 6 or that, in any event, I knew what the document would show on September 6.

Q Only as to bottom line numbers, isn't that so? How could you know what was in the document or what would be in it if you didn't have it?

A I assumed when I received a number from Mr. Faggen, who had been a C.P.A., this was an accurate number and that he knew he would have to substantiate it for me, and that he wouldn't just wildly throw out a number.

Q Now my question is:

Did you or didn't you have on that date the exhibit which is now Exhibit 1 in the complaint, on September 6?

MR. POWERS: I think that has been asked and answered about four times, your Honor.

THE COURT: I am inclined to agree, Mr. Cooper. We've gone over this.

I understand your argument, but I understood that after he finished discoursing on this in direct yesterday. So I mean we don't really get very much further by beating it again.

I understand your concern, by the way, that's obvious.

MR. COOPER: Your Honor, I don't want to burden this, but I have eight pages of deposition in which the witness has testified that the only recollection he has of that meeting were the discussions dealing with the various parameters of price.

THE COURT: Fine. But that is not this question. This question, as Mr. Powers points out, I believe has been put to the witness now three or four times. That doesn't exclude you from going on to reading him something he said on his deposition in the general area. I quite agree. That to me is a different matter.

MR. COOPER: Thank you, your Honor. I will do it, then.

Q Mr. Kaufman, do you recall that you were asked at your deposition to tell us--it begins at page 219. I am trying to synthesize this--to tell us what you remembered of that meeting of September 6. Do you remember that?

A Yes.

Q And do you remember that all you told us, having gone through ten pages of testimony, dealt only with reference to the notes which appeared on the back, or on your sheet, on your pages, as to what transpired at the first meeting? Do

you recall that?

MR. POWERS: I object to the form of that question. He is asking the witness to summarize ten pages of deposition.

THE COURT: I am afraid that I will have to agree with that, Mr. Cooper. You will have to select portions to read to him. Or else, if you would like, and even better, you can show him the transcript pages you are referring to.

MR. COOPER: Well, I will start with page 220, your Honor.

"Q Before you complete your answer--excuse me, Mr. Kaufman--I would like you, if you can, to give us the substance of the conversation and identify what you said to whom and what the party responded rather than a summary, if you can, of what transpired.

"A I don't think I can do that, Mr. Cooper, because I don't have that kind of memory. I think I have a very good memory for substantive facts, but I have never attempted to cultivate a memory which would enable me to give the kind of response you have just asked for.

I know in substance what was discussed at that meeting, but who said what in response to which question, I don't know.

"Q If you can, then, give us the substance of what you said at that meeting of what transpired.

"A What transpired at the meeting is that I was introduced to Mr. Faggen and Mr. Faggen gave me a general indication of the nature of his company and the nature of the industry. He mentioned other transactions which he had contemplated and negotiated in a sense or had been offered. We discussed the reasons why it would make sense for Faggen to get together with Titan, in general what motivated Mr. Faggen to sell his company and what motivated--what might motivate Titan to buy his company.

"Q Would you tell us what the substance of those conversations were?

"A I'm giving them to you.

"Q You are just summarizing subject headings.

"A Give me the one you want and I'll give you that one.

"Q Except that you are giving me subject headings without telling us specificallywhat was discussed.

"A Mr. Faggen indicated to me the name of his company, how many employees he had, where they were located, who they serviced, the kind of customers they had, how significant particular customers were, his plans for the future generally and with particular reference to his increasing activities in the computer services

area, his having had discussions with other companies looking toward a possible acquisition of Faggen by them or with particular reference to Levin-Townsend and to Diebold, and the fact that they had apparently in some form offered him a price which was in the seven or $7.5 million range, his desire not to go to either of those companies for, to some extent, personal reasons.

"I recall Mr. Faggen indicating at that meeting and subsequent thereto also that he had a personal feeling of strong animosity toward Diebold. I don't recall specifically why he did not want to go to Levin-Townsend.

"The indications to me were that the prices offered were basically acceptable. So that I knew at that moment that a price in cash currency of $7- to $7.5 million was clearly acceptable to Mr. Faggen. That was "his asking price," and for the purpose of that meeting, we discussed his long relationship with Mr. Robinson and how highly he thinks of Titan, that there-- I recall his making comments that theretofore he would not have approached Titan because he didn't know where it was going, whether it was good, you know, a viable company for the future, but that with the new management emphasis on acquisitions and program of growth that he felt that his company would fit well with Titan, and he

looked favorably upon a possible merger with Titan.

"We generally had a very friendly discussion. I was impressed by Mr. Faggen's apparent sincerity and honesty, and if you have any other specific questions, perhaps I can answer them."

Now, did you discuss--do you recall, Mr. Kaufman--were those questions made of you and was that your answer?

A Yes.

Q Well, now, you went into the question what would be done if Titan acquired the company?

A You have to be more specific.

Q All right. Then, I'll ask you the question--

THE COURT: Mr. Cooper, would you brook an interruption here for lunch?

MR. COOPER: Surely. I would welcome it.

THE COURT: We'll resume at 2:15.

Two administrative matters. You and Mr. Powers might think of whether or not you would like to bring in Mr. Benjamin Robinson tomorrow morning at a quarter of ten. I think we might get a lot done at that time. There will be interruptions because I have scheduled matters, but they won't be very many. There have been some cancellations for the first part of the morning.

The second thing I want to bring to your attention

is that that criminal case which I told you about, which I was hoping there would be a disposition without a trial, apparently will not be disposed of without a trial, so I will have to start that on Monday, since I made that commitment long before I ever heard of Titan Group or Harold Faggen.

But you think about tomorrow morning at a quarter of ten and let me know. You don't have to let me know now. Have lunch, and then we'll discuss it later.

MR. POWERS: My problem is that I called Robonsin's office and said 3 for tomorrow, and he may have committed the morning because I jumped again and opted for 3 as soon as I knew your views yesterday. I'm fine for tomorrow morning, and I'll call him again and see if he is available for 9:45.

(Luncheon recess.)

AFTERNOON SESSION

2:15 P.M.

E D M U N D M A R V I N K A U F M A N, resumed.

CROSS EXAMINATION CONTINUED

BY MR. COOPER:

Q I believe I was questioning you, Mr. Kaufman, with regard to what transpired at the meeting of September 6.

And in lieu of going through this thing laboriously, will counsel concede that in the questions asked of the witness between pages 219 and 230 as to what transpired at the meeting that the witness did not state that there was any discussion with respect to adjustments?

MR. POWERS: I can't state that, Mr. Cooper. I would like to stipulate to anything I can, but I haven't read it.

MR. COOPER: Would you take the opportunity to read it so I can continue? And maybe we can get that concession.

MR. POWERS: Sure.

(Pause.)

Q Mr. Kaufman, did you make a recommendation to the Block group, following the initial meeting with Mr. Faggen, that this company be acquired?

A There was no Block group to which I could ever make recommendations, in that the people who bought stock together

which I assume is who you are referring to as the Block group, were a diverse number of people and never had meetings.

Q Well--

A And I did not make a recommendation to them in writing or orally, certainly in the sense that you mean it, I believe.

Q Did you make a recommendation to Mr. Frank and Mr. Robinson, after the first meeting, that this company be acquired?

A I discussed it with them, and I think I was generally affirmative, based upon that first meeting.

Q Does that mean yes, that you made such a recommendation?

A In general, yes.

Q All right. Now, you made that recommendation without having any four-year projection or retrospective projections of what these companies' earnings would look like if they had been acquired by Titan back in 1965, isn't that so?

A My recommendation, as you put it, was not an order that it be done, but a suggestion that based upon information which had been imparted to me and subject to that information's accuracy that the transaction be acquired.

MR. COOPER: I move to strike, your Honor.

Q I asked you only if you made that recommendation based only upon earnings figures that you had for that one year.

A No, I made that recommendation based upon all of the facts that had been given to me by Mr. Faggen and others about the Faggen operations, not just on the basis of any one fact but on the basis of the earnings for the one year, my knowledge that the earnings will be increasing--

Q All right.

A Etcetera.

Q But you didn't have four-year figures at that time, did you?

A I don't recall specifically having four-year numbers in front of me at that time.

Q Now, this memorandum that you received from Mr. Faggen, when you got it at the first meeting or after the first meeting, you described that as a document which was vague in concept, wasn't it?

A In what context?

MR. POWERS: Are you referring to a deposition?

A (Continuing) Certainly in some respects, it may be. In other respects, it is quite clear.

Q Now, after having stated earlier that you had made a recommendation to Mr. Robinson and to Mr. Frank, you also had reservations about this transaction, didn't you?

A Yes, I believe I have reservations about every transaction of major magnitude.

Q But you did have one in connection with this transaction.

A Perhaps more than one.

Q And this occurred at or about the time after the first meeting, correct?

A I think--well, you are suggesting that the first meeting somehow raised some reservations, and I'm suggesting that it wasn't that simple, that I had certain reservations and continued to have certain reservations about that as well as almost every acquisition I've ever been involved in.

Q Did you question Mr. Faggen as to the adjustments?

A I think at some point we had some minimum discussion about those adjustments.

Q Did you say that the adjustments are not clear?

A Did I say that to him?

Q No. Did you say that in your testimony?

A Oh, I don't recall.

Q All right. I'll ask you the question.

Page 291:

"Q Beyond simply listening to Mr. Faggen with respect to the adjustments shown on Exhibit 4, did you engage in any questioning of Mr. Faggen as to those adjustments?

"A I think so, Yes, I think we had a discussion

about them. I don't recall how extensive. The adjustments shown are not necessarily all clear but also not necessarily terribly complicated.

"Q And--

"A And I assume they would have been expanded upon ultimately and explained. I was primarily accepting the bottom line."

Do you recall those questions being asked of you and those answers being given?

A Yes.

Q All right. Do you recall testifying, page 297:

"Q So that as far as you were concerned, when you came to the price, you were using this document which was vague in concept.

"A Don't overdo that. I mean, I understood it. It wasn't fully definitive.

"Q It wasn't fully definitive and it was something which required further explanation?

"A It required it to the extent that one would deem the material to get further explanation."

Did you make those answers to those questions?

A Yes.

Q And then did you make any attempt to verify what those adjustments were, which required additional investigation?

A That was not my function, Mr. Cooper.

Q Well, did you make a recommendation to anybody that they check into those adjustments?

A I recommended that the matter be placed in the hands of competent counsel.

Q Did you tell anybody in competent counsel's office that you had relied upon a piece of paper in which adjustments which were not definitive and which required further explanation--did you tell that to anybody in counsel's office?

A Mr. Cooper, after the--

Q Just answer my question yes or no, please.

A No, I can't answer that question yes or no.

Q All right. Then let me rephrase it.

I'll get back to that in a minute.

Mr. Kaufman, I believe you testified yesterday that after you met with Mr. Faggen at his office on October 2nd, that thereafter you went with Mr. Faggen and Mr. Frank and thereafter you went back to Mr. Robinson's office, where you met Mr. Robinson, do you remember that?

A Yes, to the best of my recollection.

Q When you say t the best of your recollection, do you have a clear recollection of it?

A I have a clear recollection that shortly thereafter I spoke to Mr. Robinson. Whether I went immediately from Mr.

Faggen's office directly to Mr. Robinson's, or stopped to have lunch first or whatever, I don't recall. But I do recall talking to Mr. Robinson shortly after meeting with Mr. Faggen.

Q When you say talking to him, you mean talking to him in person?

A I think so.

Q Did you know that October 2nd was Yom Kippur?

A I've been told that several times since, and I must have known it at the time.

Q Did you know that Mr. Robinson was not in his office and would not take calls on that date from anyone?

A Well, if that's the case, then I must have talked to him the next day.

Q All right. You also have some time sheets--

A But I don't know that, Mr. Cooper. I mean I am accepting what you are telling me.

Q All right. I'm also telling you, Mr. Kaufman, that you testified on the deposition that you keep meticulous notes of your meetings and telephone calls, don't you?

A I don't believe I said that.

Q You don't?

A No.

Q Page 8:

"Q Do you have any records of those meetings?"

These are dealing with meetings with Mr. Powers.

"A Not with me. But I record rather meticulously my meetings as well as most phone calls on my time sheets."

Do you recall that question being asked of you and that answer being given?

A Yes. But I think you are pulling it out of context. I said a lot more than that, such as I am not careful always to put things in the right time slot, that I just make sure that I account for that amount of time but not necessarily at the time that is so stated.

Q But, in any case, you do keep records of the time whether you entered it on that day or not.

A Yes.

Q Now I suggest to you, Mr. Kaufman that--have you got the time sheets with you?

A No.

MR. COOPER: They were subpoenaed.

MR. POWERS: Don't you have copies of any time sheets?

MR. COOPER: I'll use those. I was wondering if he had them.

(Pause.)

Q If you take a look at your time sheet, Mr. Kaufman, which is marked on your deposition, I ask you if your time sheet shows any record of any meeting with Mr. Robinson at any time on October 2nd.

A This is not my time sheets. That is a handwritten schedule where at a very early stage, when I was--and this was not even prepared at anybody's request, as I recall--I merely went through some time records, by no means in detail, and picked up a bunch of notations that I thought would be useful in connection with whatever testimony I might have to give.

And the reason you have these is because you asked for all of my files that I examined in connection with giving my deposition, so you were given this. But this is not my time sheets.

Q All right. But on that sheet, there is no reference to any meeting with Mr. Robinson, is there? That was your reconstruction, isn't that so?

A Yes.

Q And there is nothing on there about a meeting with Mr. Robinson, is there?

A No.

MR. COOPER: I would like to have that marked, if your Honor please.

While counsel is looking at that, shall I proceed

with the questioning, your Honor?

THE COURT: Just a minute.

Perhaps you had better. I don't know what is going on here, but apparently they have not seen this recently.

MR. COOPER: Any objection?

MR. POWERS: No.

MR. COOPER: That is in evidence.

XXX (Defendant's Exhibit E was received in evidence.)

THE COURT: Have you got anything else, Mr. Cooper?

MR. COOPER: Yes, your Honor. I wanted to question the witness.

THE COURT: Surely.

Q Mr. Kaufman, do you recall, at pages 425 and 426, 427 and at page 447, I went through with you your time sheets and asked you what your entries were with respect to the Titan-Faggen acquisition. Do you remember that?

A Yes, generally.

MR. COOPER: If counsel will follow me, perhaps we can have a concession on this: That from September 7 up to December 3rd on your time sheets, there was not a single entry related to Mr. Robinson.

A I think that is incorrect, Mr. Cooper. On the summary which you just took back from me, I just happened to note a phone call to Ben Robinson on 10/18.

Q Well, I'm talking--

A I'm otherwise certain that you are incorrect in various respects because I believe I told you--

Q Mr. Kaufman, just let me ask my questions, then, I'll take you through your deposition point by point.

MR. POWERS: I think the witness should be permitted to finish his answer subject to a motion to strike if it's inappropriate, without interruption by counsel because he doesn't like what is being said.

THE COURT: Well, I quite agree. But I didn't understand it.

Did you finish, Mr. Kaufman?

THE WITNESS: No, I did not.

THE COURT: Then please finish.

A The one point I wanted to make was that at that point in the deposition where he asked me to tell him about the time indicated on my time sheets chargeable to the Faggen acquisition, I believe I made it quite clear that in many meetings, phone calls, etcetera, I discussed a variety of matters and which item I may charge a particular hour or quarter-hour to is essentially an arbitrary one, and that it is very likely that in many time sheets I would have talked to Ben Robinson about six matters, one of which was the Faggen matter, without any indication of that on my time sheets.

BY MR. COOPER:

Q Mr. Kaufman, page 423, do you recall these questions being asked of you and these answers being given:

"Q In between August 21st and December 2nd, do your time sheets reflect the various occasions on which you had any conferences or did any work in connection with the Faggen transaction?

"A I told you my time sheets reflect a numerous amount of time spent on Titan where it was not necessarily keyed to the Faggen acquisition. But, as I say, during conferences and phone calls I frequently talk about several things. Like on August 22nd, I had a conference with a couple of my partners, and I spoke to Jerry Block. I know this says "conference, Quality Construction acquisition." That doesn't mean in the course of that conversation I didn't also talk about the Faggen acquisition.

"Q What I really want to know, Mr. Kaufman, is do your time sheets or will your time sheets show, and can you give us a summary of the specific entries dealing with che Faggen acquisition?"

Page 424:

"A I told you that it will give some indication, but very often the reference will not be too inclusive,

and I can tell if I spent any time on Faggen acquisitions--"

MR. POWERS: Excuse me. It says "I cannot tell."

Q (Reading)

"A I cannot tell if I spent any time on the Faggen acquisition during that period of time.

"For example, August 29, I have a phone call from Ben Robinson and we discuss Sam Bergman's problem. Now, that doesn't mean that we didn't also discuss the Faggen matter. We may well have. But I don't recall. I don't mention it in a particular block of time, six matters.

"Q All I want to know, Mr. Kaufman, Iunderstand your testimony to be that notwithstanding the absence of an entry in your time sheets, that doesn't necessarily exclude the possibility that you did have some discussion or did have some work done in connection with Faggen. All I want to know, however, is what days on your time sheets do actual entries appear with respect to Faggen.

"A I am sure, as I say, I can have my secretary go through these and summarize all the time spent on Titan during this period and what the entries were and I will have her do that. On all of those sheets on September 7, 'Titan-Faggen acquisition, conference Tony

Frank, 45 minutes.'

"Q And that is September 7?

"A September 7. September 6. These are just out of order. Titan flight to New York. That is on the Faggen acquisition. Apparently I was coming here for that. Later in the afternoon, conference with Aronson and Faggen at Ben Robinson's office."

That is September 6th. On September 8th:

"Calls to Tony Frank and to Harold Faggen at eight in the morning. That is L. A. time. So it would have been eleven o'clock New York time. That is September 18th.

"On September 20th, conference with Tony Frank. But it doesn't say what itwas about. This is mescellaneous, which means I covered numerous matters.

"On September 27th, time charged to Faggen deal, conference with Tony Frank."

MR. POWERS: Do you want him to continue with this?

MR. COOPER: (Reading)

"A On September 30th, call to Mr. Faggen later in the evening, conference with Tony Frank.

"On October 1st, conference with Mr. Frank and Mr. Aronson and Mr. McIntyre. He was the vice president of Titan at the time.

"On October 2nd, Titan-Faggen acquisition.

"This says, 'Examining Data. Call to Faggen and afternoon conference with Bernacchi.' I have given you that. I'll give you a complete summary.

"Q Give me the next week.

"A October 3. Well, October 3rd.

"'Charge to Stewart Mechanical acquisition.' I have, 'Conference with Stewart People, Doll and Tony Frank.' I was with Tony.

"On Saturday, October 4th, just miscellaneous-- "

MR. POWERS: You jumped over a line.

MR. COOPER: "We may have discussed the Faggen matter.

"On Saturday, October 4th, just miscellaneous, examining data, and then later in the day, Faggen acquisition. Call from Gerald Block on October 5th.

"On October 7, conference with Werner Wolfen, one of my partners, re Faggen acquisition. That is what I mean. Some of my partners may have time on October 8, Titan-Faggen acquisition. Call to Tony Frank and examining data.

"October 20th, Titan-Faggen acquisition, conference with Dick Bernacchi, Bernacchi being one of my associates and now a partner.

"Q In the week between October 2nd and October 9th, you spoke to Tony Frank on October 7."

THE COURT: For the longest time, I haven't understood any of this and the reason is, as the reporter says, it is impossible. And I really question what you are trying to do with this kind of thing. You've got to articulate it because the trier of the facts doesn't understand. It is a total washout as far as I am concerned. But, more importantly than that, given the habits of we lawyers, no record can be made of it. And that's just totally debilitating. It is a waste of time.

This case has cost you people a fortune already, and I submit to you that it is time we started cutting down costs a bit, and I can think of nothing more improvident than having a reporter unable to hear you.

I realize that the last thing you are worried about is whether the judge hears you or not, but even that might be of some significance.

Forgive me, the last is perhaps a joke. But I'm quite serious about the first.

MR. COOPER: Judge, I don't relish--

THE COURT: I know you don't intend it. I am trying to tell you, to reinforce what the reporter says to you. It sounds like gibberish to us.

And, of course, you don't mean that.

Now, let's go back.

MR. COOPER: Beginning at page 445. I have taken you up to October 9th.

"Q The reason I'm asking the question, so you understand from that, it sppears that the last communication that you had in connection with the Faggen matter prior to its actual closing was on October 24.

"A I don't know whether this is exhaustive and whether I stopped and whether there were subsequent times. My recollection is that I only looked through October when I was working on this. But there may have been something in November or December, I don't know.

"Q Let's try and nail it down. You have the time sheets with you now, haven't you? We went only up to October 9th on those time sheets.

"MR. POWERS: I would like you to continue from October 9th on.

"A Here. From October 24 on.

"Q Up until October 24.

"A This says '72, but I think that is an error. I must have meant '68. You want me to start with when?

"Q Pick up on October 24.

"A Okay. October 24. I have 'Titan acquisition

call to Aronson'on my time sheet. That is apparently what that reference on that handwritten memo is about. I have numerous other times charged to Titan, but not specifically for Faggen on subsequent days where, as I say, I may well have talked to people about the Faggen transaction.

"For example, on October 25, Titan Vermont Lumber acquisition, call to Tony Frank. I don't know whether I spoke to him about other things, but, as I say, I frequently did.

"On Friday, November 1st, I have just under miscellaneous, Titan call from Tony Frank. Then I have 'conference later in the day, conference with Tony Frank.'

And then I have later in the day 'Call to John Spence, conference with my partner Wolfen.'

"Q Those references do not specifically identify Faggen, though, do they?

"A No, they just say 'miscellaneous.'

"Q Let's find the next reference to Faggen in your time sheets.

"A November 5th.

"Q What does that say?

"A Titan-Faggen acquisition, call from Tony Frank, call to Dick McIntyre.

"Q Anything else ? Does it say what you said?

"A I don't say what I said on my time sheets.

"Q Do you have any memo which would show what you've said?

"A No.

"Q Go ahead.

"A November 6, Titan-Faggen acquisition, call from Aronson. I am only now going through the items which have specific reference to Faggen.

"Q Right.

"A November 14, Faggen acquisition, calls to Michael Rosen and from Tony Frank.

" November 22nd, Faggen acquisition, call to Michael Rosen, and then 15 minutes of just working on data, which means looking at things or whatever.

" November 26, call to Aronson and Rosen. I am through with the end of November.

"Q Let's start December. Do you have anything in December?

"A Titan-Faggen acquisition, call to Ben Robinson on December 3rd."

Now, then, Mr. Kaufman, having had these questions and answers read to you, does that refresh your recollection as to whether your time sheets have any entries in them between

the date of September 6 and December 3rd, in which you had a meeting with or a call to or from Ben Robinson in connection with the Faggen acquisition?

A No.

Q It does not?

A No. It seems to me that what I said to you before was still true, that I had numerous conversations with various people about Faggen, and that in many instances, I'm not sure what I talked about when I talked to many of these people about other matters. And, as I've tried to indicate, I can only charge a particular time segment to one item, although I may have talked about the Faggen acquisition, I'm sure I did, on several occasions.

Q In any case, Mr. Kaufman, those meticulous time records of yours do not show an entry on October 2nd with Ben Robinson, do they?

A Apparently no.

Q Mr. Kaufman, you prepared the first draft of the contract, didn't you?

A Yes.

Q Thereafter, you received a red lined redraft from Michael Rosen, didn't you?

A Yes.

Q Now, then, I show you this document and ask you if

this document is the copy which you gave to me at the deposition as the draft which you had prepared.

A Yes, without going through it page by page. I mean, it looks like the draft which I prepared.

Q Do you have the original of the draft which was sent to you by Mr. Rosen with you here in court?

A No.

MR. COOPER: Can I have this marked? May we mark this in evidence, your Honor?

MR. POWERS: No objection.

XXX (Defendant's Exhibit F was received in evidence.)

Q Now, I show you this document which you submitted on the deposition, Mr. Kaufman, and ask you if that is a document which you received from Mr. Rosen, which contains the red lined delineations.

A Yes, this appears to be, again without my authenticating each and every page.

Q But you notice, this being a Xerox copy, they came out black, is that correct?

A Yes.

Q But on the original, they were red?

A I think they were. I am assuming I received the original. I don't know for sure. I say that because it is so typical--

Q But the copy you didn't receive?

A I think so. But it is so typical of us lawyers.

MR. COOPER: I offer that.

THE COURT: I notice, Mr. Witness, that the Defendant's Exhibit F, which I understand to be a copy of your first draft, has throughout on the bottom "10/21," which I assume your stenographer put down there at the time when the draft was completed, is that a fair assumption?

THE WITNESS: Yes, your Honor. Normally, she will type on each page the date when that page was typed, and sometimes there will be different dates on different pages.

THE COURT: Right. I follow. Thank you.

Yes, sir?

MR. COOPER: I am offering the red lined draft from Mr. Rosen to Mr. Kaufman.

MR. POWERS: No objection.

XXX (Defendant's Exhibit G was received in evidence.)

THE COURT: This is the draft that Rosen did?

MR. COOPER: Yes, your Honor.

THE COURT: Or the redraft?

MR. COOPER: Yes, your Honor. From the first draft from Kaufman.

THE COURT: Right.

Q Mr. Kaufman, I have Xerox copies of each of the docu-

ments which are now in evidence. The Court is looking at it. I ask you if you will look at these two and the draft which you originally prepared called for financial statements in paragraph 3, which was in the representations and warranties to be annexed, isn't that correct?

A That is correct.

Q But in the subsequent draft, which was received from Mr. Rosen, in place of financial statements, there was the substitution of income tax returns, their balance sheets and income statements connected thereto, isn't that correct?

A Also trial balance sheet and trial income statement.

Q Yes. Those were all part of the subsequent contract documents which were not part of yours?

A No, they were also part of mine. Stub period statements were part of what I had asked for as well.

Q Now, so that we understand the delineations or the dates on the bottom, your first draft has the notation of 10/21 and I believe the Rosen redraft has the notation of November 8 on the bottom, is that correct?

A Yes.

Q Would that indicate the date that you got it?

A I don't think so. I think it would indicate--I assume--it is not my handwriting, that 11/8, and I would not normally have indicated page by page when I got a page.

Q So it would be your secretary's?

A No. I don't think so. I would assume it was Mr. Rosen's secretary who put that on.

Q Mr. Kaufman, at the time that you transmitted these documents and received them back, you didn't see any significance to the exchange in the representations in the redrafted contracts or question their sufficiency, did you?

A Oh, I saw some differences and some significance, but in reading the entire document, I was satisfied at that point that there was nothing that I need raise.

Q And you never did raise any objection to it, did you?

A I don't know what you mean by that. I did discuss the documents with Michael Rosen, and while I don't remember everything I said to him, we discussed the registration rights in one or two items.

Q I'm dealing specifically, Mr. Kaufman, with the representations and warranties. Did you ever express any objection to the representations and warranties as contained in the draft sent to you by Mr. Rosen?

A I don't recall expressing any objection to the representations and warranties as contained in that draft, no.

Q And, Mr. Kaufman, as an experienced merger and acquisition attorney who conducted over 400 acquisitions and mergers prior to this one--

A 300 is the number I used.

Q --300 prior to this one, you were aware, weren't you, that the representations and warranties which the purchaser sought was for the purpose of securing for the purchaser representations and warranties dealing with the financial aspects of the companies being acquired, weren't you? Do you understand my question?

A Well, it was an awfully long, complex one, but--

Q Let me withdraw it.

A Okay.

Q What is the function of a representation and warranty in a merger acquisition contract?

A Generally to assure the purchaser of the accuracy of certain matters covered by that representation or warranty. And to provide a basis for some disposition of it.

Q You know for a fact, do you not, Mr. Kaufman, that never since the date of this acquisition have the representations and warranties contained in those contract documents ever been challenged by Titan?

A Well, I don't know whether as a formal legal matter they have been challenged. I have no doubt that if the allegations made by Titan are correct that the representations and warranties in the contract are incorrect.

Q Mr. Kaufman, are you saying that the financial repre-

sentations and warranties which are in this contract are incorrect dealing with the earnings statements annexed to the contracts?

A Yes.

Q You are saying that the income tax returns showing the earnings are incorrect?

A No.

Q What's what I'm asking you.

A Well, I don't know whether the income tax returns, to the extent that they represent what they purport to represent, are correct or incorrect. What I am saying is that they are representations concerning the financial aspects of the Faggen operations which I believe are incorrect on the assumption that the allegations made by Titan are correct ones.

Q Without making any assumptions by anybody, I'm asking you of your own knowledge, do you know whether there is anything in the financial representations dealing with the income statements and income shown in the contract documents that are incorrect?

A Yes.

Q Which ones?

A Paragraph 3.23 on page 14. I am reading from Mr. Rosen's draft, which is what I presume you want an answer on. It says:

"Material misstatements or omissions, underlined. No representations or warranties by the seller in this agreement, nor any documents, statements, certificate or schedule furnished to Titan pursuant hereto or in connection with the transaction contemplated herein contains or will contain any untrue statement of a material fact necessary to make the statements or facts contained therein not misleading."

I consider that all financial data given to me, whether or not affixed to this contract, which is specifically what this 3.23 says, is either accurate or, if it's inaccurate, that there has been a breach of this contract. And I assume, on the basis of what Mr. Faggen himself testified to, that the financial data presented to me in the so-called pro forma statements, as well as to the board of directors of Titan through Mr. Frank and Mr. Robinson, is concededly incorrect.

Q Oh, is it?

A Well, Mr. Faggen, I heard him testify to the effect that these adjustments were put together between him and one Rogov and that he had no confidence in them. But that's not my knowledge, and they were presented to me and I had confidence in them.

Q I see. Well, now, you've made an interpretation of

what paragraph 3.23 means, as to whether or not that document is a document to be treated as one which is supposed to be part of this contract. But other than that, Mr. Kaufman, I'm addressing my question to the income tax returns. I asked you in my question whether there was anything in the figures shown on the income tax returns that have ever been shown to be inaccurate?

A Well, that I don't know because I have never audited the income tax returns.

Q I see. Are you aware that Mr. Hatcher made an audit and dollar for dollar of the Faggen books, dollar for dollar the numbers came out precisely as they were in this contract?

A Well, Mr. Cooper--

Q Just answer my question yes or no. Do you know it?

A Yes, I know that.

MR.POWERS: I object to his interrupting the witness in the midst of an answer. I think he should be permitted to answer the question.

THE COURT: There I don't agree with you.

Gentlemen, I want to take the afternoon recess. I am told I am going to have to treat with some grand jury problems in a few minutes. But before they get here, I would like to talk to counsel again in the robing room in the few minutes which I think we'll have to do this.

(Recess.)

THE COURT: All right, Mr. Cooper.

Q Mr. Kaufman, when you saw the tax returns that you had received, you realized, did you not, that the net income before taxes was substantially less than $550,000, didn't you?

A Yes, sir. The amounts shown on the tax returns were substantially less.

Q And the tax returns were the only financial representations with respect to income in these documents, isn't that so?

A They were the only--plus the stub period reports. You are talking about the document being the Michael Rosen draft subsequent to my first draft, and I don't know how close that is. I think it is not quite the same as the final agreement which was signed, which I think is somewhat different than even the Michael Rosen draft.

Were you looking at the Michael Rosen draft, the specific financial statements, if you want to call them that, represented as such in that one paragraph with the tax returns and stub period reports.

Q In order to get the figures up to $550,000, adjustments had to be made, didn't they?

A 571,000.

Q Pardon?

A 571,000.

Q All right. 571,000. Adjustments had to be made.

A Yes.

Q And those were adjustments which were necessary in order to project or to create a restatement of earnings which would show increased earnings, isn't that so?

A No, not to project or create but rather to restate.

Q All right. Let's use the word restate. In order to restate the earnings on a pro forma basis, adjustments had to be made, right?

A Yes.

Q Okay. Now, the adjustment items which had to be made were as follows, weren't they:

One was pension overfunding, isn't that so?

A Yes, sir.

Q And when you take pension overfunding, if the amounts that have been put into the pension fund actuarially are sufficient to take care of the actuarial needs of that fund, and any additional sums that are put in is an overfunded item, isn't that so?

A Generally speaking, yes.

Q And in this case, one of the items for adjusting was the pension overfunding for all companies was about $64,000, isn't that right?

A I don't remember the exact amount, but there was a significant item of pension overfunding.

Q And you went over that with Mr. Faggen, didn't you?

A Well, as I've previously indicated, I don't recall specifically which of the adjustments we went over and to what extent we went over them, but I was generally aware of the adjustments and, in general, they were I think discussed to some extent.

Q You know as a fact, don't you, that private companies, when they are acquired by public companies, the analysis that is made is to see in what way have taxes been minimized, which would have to be reported if the companies were publicly-held, right?

A Well--

Q Let's do it with this company. Never mind all companies. This company.

A That I think is an over-statement or perhaps just not an accurate statement. The financial statements of Faggen, had it been public itself, would have necessarily, almost necessarily, have been different because the requirements for statements are different under the tax laws than under the securities laws.

Q In this particular case, Mr. Kaufman, the adjustments that were being made were adjustments which were designed to

convert the earnings of a privately-held company into what they would have been if they had been publicly-held.

A No, they were designed to convert or to show what the earnings would be if reported under what we normally refer to as generally accepted accounting principles rather than as reported on the tax return.

Q Mr. Kaufman, when you say they were reported as if they had been reported under generally accepted accounting principles rather than if they had been a public company, is that what you said?

A Yes.

Q Mr. Kaufman, if there was an adjustment for personal accounting fees which were going to be added back into the earnings of those companies, those personal accounting fees would never have shown up on the private company's returns, would they?

A But that specific item is of a nature which is different than something like pension overfunding.

Q I quite understand that. You said that the reason for these statements being prepared this way was not for the purpose of converting from a private to a public company, and showing how after they've minimized taxes, if the items which they had been minimizing were added into the earnings of these companies, how those earnings would have been increased. You

say that is not what was done here.

A That is comprehended by it, but the purpose was to show what the earnings were under generally accepted accounting principles.

Q Whether or not that was the purpose, the point was that what you were trying to get at in going over the adjustments was to find out how earnings of, let's say, $365,000 a year as reported on the tax returns could be restated so as to show earnings of $571,000 if these companies had been publicly-owned, isn't that what you were trying to do?

A Correct.

Q Now, among the items which had to be restated, one of them was pension overfunding, right?

A Correct.

Q Another item that had to be restated was this matter with regard to T&E, isn't that so?

A Travel and entertainment, correct.

Q Another item that had to be adjusted was the item of salaries, isn't that so?

A I don't recall an item of salaries on the original memo given to me for adjustments. I have to have the memo in front of me to make sure.

Q Let's do it this way. As a matter of fact, you testified--

A I think there was a prepayment of salaries item on the memo originally given to me, if that's what you mean by salary adjustment.

Q I'm talking now not about the prepayment. I am talking now about whether or not there was an adjustment contemplated to the salaries of Mr. Faggen and Miss Dogan in the discussion that you had with Mr. Faggen regarding the restatement of his earnings.

A I don't recall that.

Q You know, don't you, that when Mr. Faggen sold these companies to Titan that by contract his salaries, which had formerly been in the range of $87,500 a year for all of his companies, were reduced to $50,000? Did you know that?

A I may or may not have known that.

Q He certainly didn't reduce his salaries gratuitously, did he?

A I did not negotiate a reduction of salaries.

Q But you were the only one who negotiated the deal with him, isn't that so?

A If by the deal you mean the price and the nature of the consideration to acquire his company, yes. But if you mean a salary or employment arrangement with him, I did not negotiate that with him.

Q Well, Mr. Kaufman, you know for a fact, don't you,

after the contracts were executed, that the salary of Mr. Faggen was $50,000 a year, isn't that so?

A I believe that I knew that his salary thereafter was $50,000 a year.

Q And you knew from the tax returns that his salary before the acquisition was $87,500 a year for his companies.

A I don't recall knowing that--

Q All right. The tax returns speak for themselves, Mr. Kaufman. I want to move this.

The other item was the item of personal accounting fees. That was another adjustment, wasn't it?

A Yes.

Q And that was $35,000 that had to be added back into the earnings of these Faggen Companies, isn't that so?

A I'll take your word for it.

Q It is attached to the complaint. There is $35,280 which you say was an item that you never even knew about.

MR. POWERS: Objection. I don't think there has been any testimony that he never even knew about that item.

MR. COOPER: All right. I'll get it.

THE COURT: While you are looking for that, Mr. Cooper, I'm sorry to say there is another grand jury, which catches me by complete surprise. So, if you could take a moment to look that up, while you withdraw, we'll handle the

other grand jury.

(Recess.)

THE COURT: We are through pensions. Have you got anything else, Mr. Cooper?

MR. COOPER: Yes, your Honor. I was on the accounting fees.

THE COURT: Yes. I'm sorry.

Q Pages 483 and 484, Mr. Kaufman.

"Q Do you know whether the amounts which were related to the fees which he personally received were reimbursed to the company after acquisition?

"A Where is there a suggestion the amount which he had previously received would be reimbursed to the company? I don't even understand the question.

"Q If you look at Exhibit 5-A" -- which is, Mr. Kaufman, the pro forma, the Exhibit 3 -- you know what I'm talking about -- "if you take a look at Exhibit 5-A, you see an item, 'Harold Faggen Personal.'

"A I had not seen Exhibit 5-A until recently.

"Q I understand that. All I'm asking you is, did you do anything with respect to these adjustments? Did you inform anybody to check on these so-called adjustments?

"A I did not know about those adjustments."

Do you remember those questions being asked and that answer being given?

A I would have to see the contracts in which that was all said in order to understand the point, Mr. Cooper. I'm not denying that I said what is printed there. I've read my depositions and I signed them.

Q What I'm asking you, Mr. Kaufman, is, in the negotiations with Mr. Faggen regarding the adjustments, was there an adjustment for his personal accounting fees which were to have been added back into the earnings of the Faggen Companies, in your discussions?

A I recall some such adjustment. I don't recall whether I had a specific discussion on that specific adjustment with Mr. Faggen.

Q Well, when you recall some such discussion, what discussion did you have?

A Some such adjustment.

Q Some such adjustment?

A I remember there was an adjustment relating to that subject on the pro forma.

Q Did you have a discussion with Mr. Faggen with respect to it?

A I don't remember.

Q Well, in any case, you are not suggesting as to that

item, are you, Mr. Kaufman, that Mr. Faggen in the preparation of this pro forma, which was given later on to Mr. Frank, that he gratuitously added that item on if it hadn't been discussed with you?

A I don't know what you mean by "gratuitously added that item on". That item, as I understand it, relates to accounting fees which presumably--which I understood were part of the services he was rendering for clients which he took personally, which, within the context of a public company, should belong to the company, and accordingly, was more properly treated as income of the company for our purposes, and my understanding was therefore that to the extent that such services would continue to be rendered, the income for those services would be given to the company. And therefore, it was an appropriate adjustment to make in computing what the income of the company would be.

Q All right. So then we have $64,000 for pension overfunding, we have at least $35,000 for personal accounting fees, we have an item--did you discuss the amount of travel and entertainment adjustment that was going to be made?

MR. POWERS: I object to that question. He starts off, "We have $64,000." We don't have any $64,000 at all. We have a statement by Mr. Faggen that there should be a $64,000 adjustment, and in issue in the case is the propriety

of that adjustment.

Feeding a misleading question to the witness in order to establish testimony which is inaccurate, based on the record.

THE COURT: I am not so sure. But perhaps we can obviate this.

What is going on here? You are dealing with the adjustments which are part of the pleadings in this case, I believe, and that is what I understand Mr. Cooper to be working with. Am I correct?

MR. COOPER: Precisely, Judge.

THE COURT: So, just because he puts the question this way doesn't mean that he is deciding the case, Mr. Powers. I don't agree. At least, as far as I am concerned. But I think he is putting the question fairly.

Go ahead.

Q Have I stated for you, Mr. Kaufman, the adjustments which were discussed between you and Mr. Faggen at your meetings either on September 6th or October 2nd?

A Mr. Cooper, I would have to have the list in my hand to verify whether you have stated them all. And, secondly, as I told you, I don't recall a specific discussion about specific adjustments. I am sure that I looked at the adjustments and I may have had a question or two about one or two of them. Most of them -- subject to verification of their

validity, are essentially self-evident as to what they mean. At least, they were, I think, to me. I thought I knew what they were intended to signify.

Q All right. Then, let's do it the other way, Mr. Kaufman.

On the tax returns, as a skillful person in mergers and acquisitions, you could take a look at the tax return and see an item called pensions, and if Mr. Faggen told you that this amount that is on there for pensions is an overfunding and that this can be eliminated in the future, mental calculations,very quickly you can add back in the $64,000 if that is on the tax return, if what he is saying is so, isn't that so?

A Of course.

Q Okay. So far as the salaries, if there was a discussion on salaries, and if he had a salary of $87,500 and he was going to reduce it to $50,000, that is a very simple adjustment,isn't it? 30,000, 37,500?

A Right.

Q If there was going to be an adjustment for personal accounting fees of some $35,280, that was going to go into a comparatively simple item to check, wasn't it?

A I don't know what you mean, "item to check." I was talking to Mr. Faggen.

Q All right. You said a moment ago, Mr. Kaufman, that any of these things could have been verified if somebody would have verified them, right?

MR. POWERS: Objection. There was no such testimony, your Honor.

Q Didn't you say that they should have been verified?

A No.

Q You didn't. Okay.

A I don't know about "should have been." I mean--

Q Let's finish my line of questioning first.

I'm talking about the nature of the adjustments. We have taken through two of them. Travel and Entertainment. That was an adjustment you could take a look at the tax return, you could see how much was spent for travel and entertainment and you could make a determination whether an amount could be eliminated from that item which, if eliminated, would become another adjustment.

A I could make no such determination. Mr. Faggen could tell me what a fair determination would be. But I had no capacity to make such a determination.

Q Okay. There was a discussion on that item, right?

A I don't remember if there was a specific discussion. It is unlikely that there was, I suspect.

Q Now, tell me, Mr. Kaufman, you went over to Mr.

Faggen's office on October 2nd, you had a preliminary discussion with him on September 6th. Between September 6th and October 2nd, you and those of your principals back in Los Angeles that you discussions with respect to the prices that you were going to think about paying for this company in the parameters of $5.5 million --isn't that a fact?

A Generally, yes.

Q And all you had prior to going into the meeting on October 2nd were four years of tax returns and this memorandum that you had, and you had been able to reach a price in your own mind among yourselves that,with these kind of figures, you were willing to pay $5.5 million in convertible subordinated notes of 4%, right?

A We were willing to agree to do so.

Q Okay. Now, then, when you came down to that meeting on October 2nd, didn't you think it important to check back over any of the items that were discussed with Mr. Faggen to determine whether or not, in reaching a price like $5.5 million these items were realistic items?

A Mr. Cooper, I'm sorry, in the sense that I'm a lawyer because this puts me in this respect at a disadvantage. And if you were in the witness box, I could ask you the right questions. I don't know how to check these things short of saying to Mr. Faggen, "Mr. Faggen, those are the numbers you've

given me. Now, are they real or are you lying to me, Mr. Faggen?"

I mean, as a lawyer, even where I have had far greater responsibility for a transaction than this one, I don't normally open the man's books and say,"Mr. Faggen, show me where this pension was overfunded. Compute for me what the proper funding is. Show me the travel and entertainment. Show me your vouchers. Let me check your check register."

That's an auditor's work, if anybody is going to do that kind of verification. And I assumed I was dealing with a truthful man, and that he was telling me things which on their surface appeared credible.

Q Now, then, Mr. Kaufman,aren't the items that we have been talking about items which were not reflected on any financial statement which had been given to you?

A Well, many of those items were reflected on the tax return. They were just treated differently.

Q Precisely. There was no statement in which you saw those numbers treated in the fashion in which you had discussed them with Mr. Faggen, isn't that so?

A There was a pro forma adjustment.

Q The restatement, right?

A Yes.

Q Mr. Kaufman, when you don't have an opportunity to

check specific items of earnings, isn't that the very subject matter on which you get a representation and warranty when you make a deal for $5.5 million?

A I thought we had one.

Q You looked at that agreement. Did you think that you had a pro forma restatement of earnings representation and warranty in those agreements?

A I had a representation that anything given to Titan or its agency is represented as being true and reasonable and accurate or whatever that language is.

THE COURT: Anything else?

MR. COOPER: I don't think so, Judge.

THE COURT: Any redirect, Mr. Powers?

MR. POWERS: No, sir.

THE COURT: Before one of us changes our mind, Mr. Kaufman, I suggest you be excused.

Thank you.

(Witness excused.)

MR. POWERS: What time are we going to start tomorrow, sir?

THE COURT: Well, I would suggest that we start at a quarter to ten. I would hope to be able to give you an hour then to complete, I would hope, the witness who has been waiting all day.

MR. POWERS: Mr. Frank.

THE COURT: I don't know. I can't be too sure because I'm vulnerable to being hit without warning here in this Part. But I suggest that you likely try to start at a quarter to ten and pick up an hour or an hour and a quarter which hopefully might complete Mr. Frank.

MR. POWERS: What time do you have available for the afternoon?

THE COURT: I am going to try and make 3, as I told you.

I am assuming that Mr. Robinson in particular won't take very long. But maybe I am wrong in that.

MR. COOPER: Not with me.

THE COURT: I wouldn't think from the plaintiff's point of view, either.

(Adjournment was taken to Friday, February 22, 1974 at 9:45 A.M.)

TITAN GROUP, INC.,

vs 72 Civil 1797

HAROLD FAGGEN

New York, N. Y.

February 22, 1974 - 9:45 a.m.

(Trial resumed:)

MR. POWERS: I would like to call as the next witness for the plaintiff Mr. Anthony Frank, please.

A N T H O N Y F R A N K , called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Frank, when did you go to work for Titan?

A About the end of March 1968.

Q What was your background and experience before you went to work for Titan?

A I had been an executive in the savings and loan business in California for virtually all my working life.

Q Were there any particular specialties in savings and loan work that you engaged in?

A No. The broad gamut, principally real estate marketing.

Q When did you leave Titan?

A I left Titan in January 1970.

Q And what is your present job?

A I am president and chief executive officer of United Financial Corporation of California.

Q Is that corporation listed on the New York Stock Exchange?

A Yes.

Q Now, Mr. Frank, do you have any business relations with Titan now?

A None.

Q Tell us as best you can recall the negotiations in which you participated in 1968 leading up to the first pricing conference, in or about September of 1968, on the Faggen acquisition. I am first interested in all the conversations you can recall with Mr. Faggen on the subject of the acquisition from the first one up until September 6, 1968. I would like to cover those conversations first.

MR. COOPER: Your Honor, I am going to object to the form of the question.

THE COURT: I am afraid I have to agree.

Q Mr. Frank, would you tell us, fixing a date and who was present and what was said, each conversation with Mr. Faggen that you can recall in the summer of 1968 on the

subject of his acquisition?

MR. COOPER: Same objection, your Honor.

THE COURT: He is trying to save time, Mr. Cooper. Now come on. Let's not be so picky here. He stripped the rhetoric out of the first question, which I agreed with you on.

But, first of all, did you have any conversations at all with Faggen prior to September 6, 1968?

THE WITNESS: Yes, I did, many, your Honor.

THE COURT: All right. When was the first conversation?

THE WITNESS: I would suspect it was about June of 1968, when I was introduced to him.

THE COURT: Take it from there.

MR. POWERS: Thank you, your Honor.

Q Who introduced you to Faggen?

A Mr. Robinson.

Q And where was this conversation?

A Midtown New York. It was either Mr. Robinson's office or mine. They were about two blocks apart.

Q What did Mr. Faggen say in this conversation, and what did you say in substance?

A Basically Mr. Robinson suggested that he had great respect for Mr. Faggen and for myself, and that he

wanted us to get to know one another.

MR. COOPER: Excuse me. Your Honor, I don't know if Mr. Frank is referring to notes as he is testifying, but I know that he was reading.

MR. POWERS: This is just an exhibit he was looking at, your Honor.

THE WITNESS: No, I was not reading.

MR. COOPER: All right.

Q And what did Mr. Faggen say, if anything, in the conference?

A It was just the usual type of first meeting: you know, "What do you think, What are you doing? Gee, that sounds interesting. What kind of a business is it?" We talked back and forth.

Q Did you have a series of conversations with Mr. Faggen over the summer?

A Yes.

Q Do you recall the first conversation where you talked about the business substance and the earnings of the company?

A We talked about the business substance from the start, what business he was in, what the dynamics of it were, where it was leading, what could be done with it. As far as the earnings of it, I don't believe that I talked directly

to Mr. Faggen about earnings until October 1968. The information about earnings of the company came from others.

Q Were you present at any meetings with Mr. Faggen in September of 1968?

A No, I don't believe so.

Q Did you have any meetings with Mr. Faggen from the date Mr. Kaufman had a meeting with him on September 6th until October 2, '68?

A None that I can recall.

Q Did you have any meetings with Mr. Faggen on or about October 2, '68?

A No.

Q What is the first meeting that you can recall with Mr. Faggen where you discussed the earnings of the company?

A Shortly before the board meeting on October 9, 1968, I had requested either directly of Mr. Faggen or through Mr. Kaufman or Mr. Robinson to have a description of his company, with earnings and plans ready so that I could make the presentation to the board. And so I suppose around October 7th or so, I met with Mr. Faggen, when I got the memorandum and the earnings restatement.

Q I show you Exhibit 3. Is this the memorandum that you referred to?

A Yes, sir.

Q There are two names on the front page of Exhibit 3. Can you read those names?

A It says A. Frank, B. Robinson.

Q Do you know whose handwriting those names are in?

A No, sir. Not mine.

Q Did you receive a copy of this memo?

A Yes.

Q Now, there is also some writing on the earnings, the net income portion, on the third page of that exhibit. Can you read that writing (indicating)?

A Yes. It says "excludes investment income."

Q Whose handwriting is that in?

A Mine.

Q Do you recall any conversation with Mr. Faggen in connection with your writing "excludes investment income" on the fourth page of that exhibit?

A Well, when I received this Exhibit A, as it is called here, I had heard, of course, that the pretax earnings, adjusted pretax earnings of this firm were about 550,000, and I just wanted to double check, or triple check I suppose, this, the excluded investment income, because I knew he had an investment portfolio. So I asked him.

Q Can you fix a time for this meeting, the approximate date?

A No. It was either October 7th or 8th, one or two days before the board meeting.

Q Can you fix a place for the meeting?

A It was in my office.

Q Now, did Mr. Faggen tell you anything else about his earnings in that meeting?

A Well, if he did, I don't recall. The memo itself is pretty comprehensive on that subject.

Q Did he tell you about any of the adjustments that went in to make up that list of earnings on Exhibit A, which is the fourth page of Exhibit 3?

A Yes.

Q What did he tell you on that subject?

A He mentioned that, of course, these figures were restated and that it was as a result of some adjustments. And the only two adjustments that I recall his mentioning to me were the pension overfunding, which we discussed considerably, and a passing reference to the fact that he was taking private accounting fees directly, which, of course, he would be unable to do once he was an employee of Titan.

Q Any other adjustments mentioned to you?

A None that I recall.

Q Do you recall any discussion with Mr. Faggen on the subject of computer capability?

A Oh, yes. We had many conversations on that score.

Q Did you have such a discussion at or about the time you got this memo?

A Quite probably. But the memo itself covers the subject matter of the many conversations we had about this matter earlier.

Q What was the substance of what Mr. Faggen told you about computer capability?

A He had three basic points to make, I think. First of all, he was already in the computer business perforce because he needed them to do his business, and that in the course of his regular business he had accumulated a data bank of several million persons, beneficiaries of the pension plans he did actual work for, and that it would take relatively little work to meet the demands of his union clients to employ the complete data processing services for those non-union clients, such as dues collection and health administration, I suppose, and other aspects.

Those were two of the three points.

The third point was that Mr. Faggen had the concept, which I grew very excited about, of computerizing the capability of analyzing relatively small corporate pension funds and using that capability with almost no face-to-face contact between the client and the actuary, which is the key

to keeping the costs down, as a sales device for, say, other CPA's or for brokerage firms.

Q What, if anything, did Mr. Faggen tell you on the subject of the number of his clients?

A Just what is contained in this memorandum. I think it is 140 clients or so.

Q Did he tell you anything about having lost any clients? Did that subject come up?

A Not that I recall.

Q Now, I show you Plaintiff's Exhibit 7 for identification and ask you if you have ever seen that document before.

A Yes, I believe I have.

Q In what connection did you see that document?

A I believe it was shown to me by Mr. Robinson, and I frankly just don't recall at what point in time. I believe it was prior to the board meeting that approved the acquisition in principle, that it be furnished to him, to Mr. Robinson by Mr. Faggen.

MR. POWERS: I would like to offer Exhibit 7 in evidence, your Honor.

Excuse me. I am off, your Honor. That should be 8. I would like to offer Exhibit 8 in evidence. And please correct the record that the sheet shown to Mr. Frank by Mr.

Robinson is denominated as Exhibit 8 for identification.

MR. COOPER: May I have a voir dire on this, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. COOPER:

Q Mr. Frank, do I understand that you don't recall when you received this?

A That's correct.

Q And --

A I never said I received it. I said I didn't recall when I saw it.

Q Oh.

MR. POWERS: Excuse me, your Honor. I think the testimony was, "I don't recall when I saw it but I think it was before the board meeting."

THE COURT: Gentlemen, please. This is totally unnecessary. I do not need all these corrections from your adversarial viewpoints.

Again, we all have our own roles here and I would just as soon you not usurp other roles.

Now, let's get back. We waste more time about trivial details in this matter.

What is your question, Mr. Cooper?

MR. COOPER: My question was, did he receive it. His answer was no. And I asked him when he remembered seeing it and he says he recalls seeing it in Mr. Robinson's possession.

THE COURT: That is correct, which he has already told us. Now what do you really have on your mind? Let's get to it.

Q Is it possible, Mr. Frank, that you didn't see this until after the closing?

THE COURT: That you can cross examine him on. Now please, that's not proper.

MR. COOPER: I have no objection to it, your Honor.

xx (Plaintiff's Exhibit 8 for identification was received in evidence.)

MR. POWERS: Your Honor, I was in the midst of handing up Exhibit 8.

BY THE COURT:

Q Mr. Frank, do you have any information as to who prepared this projection of income?

A I recall, your Honor, being told by Mr. Robinson that it was prepared by Mr. Faggen.

Q By Mr. whom?

A Faggen.

Q Oh, by Mr. Faggen.

A Yes, sir.

Q But you have no direct knowledge on that?

A No, sir.

THE COURT: Thank you.

All right. Anything else, Mr. Powers?

MR. POWERS: Yes.

DIRECT EXAMINATION CONTINUED

BY MR. POWERS:

Q When was the board meeting to review the Faggen transaction?

A October 9, 1968.

Q What, if anything, did you do in connection with Exhibit 3 at the board meeting?

A Well, -- excuse me. Is that the memorandum?

Q Yes.

A I laid out for the board, which had been apprised at the July meeting that there was some chance of acquisition -- I laid out for them specifics of the transaction as I knew them, principally using for those specifics the Exhibit 3.

Q Can you tell the Court what you said to the board about the Faggen Companies at the board meeting?

A I can only --

Q In substance.

A Five and a half years later.

I told them that this was an ongoing business and had been for many years, that it was engaged in a pursuit which was obviously recession and depression proof in that federal and state laws require actuarial statements for union pension funds, and that I believe that there was some opportunity to integrate it with our insurance brokerage system which we already owned, and that the business was growing at a pretty constant state both because of new clients and because the existing clients were used to being charged on the basis of assets rather than on the basis of work for actuarial purposes, and that it appeared to me that there was a substantial profit opportunity in expanding the computer aspects of the Faggen operations.

Q What, if anything, did you say on the subject of the earnings for 1968 or prior years in the Faggen Companies?

A I said that they were above $550,000 and that they seemed to be growing at a pretty constant clip.

Q Did the board ask you any questions about earnings or make any comments?

A I'm sure they did. But I don't recall, Mr. Powers, what they were.

Q What, if anything, did you say on the subject of new clients in the Faggen Companies?

A I stated that I had been told that there were new clients, that one major such client had been landed or was about to be landed due to some splitting of one major union from another existing union, which would require four new actuarial services for the new union.

Q Did you tell the board anything about losses of clients by the Faggen companies in '68?

A No.

Q Did you know anything about losses of clients by the Faggen companies in '68?

A No.

Q Did the board approve the deal on October 9th?

A It approved it in principle.

Q And did you attend to the writing up of a set of minutes for the board after the meeting?

A I participated in that.

Q Right. And did those board minutes make any reference to any of the material you had talked about at the meeting?

A Well, as I reviewed the minutes and the exhibits here, several of the phrases used in the minutes parallel the phrasing used in Exhibit 3.

MR. POWERS: Your Honor, to save time, I am not going to separately introduce the board minutes because they

are already a part of the Kaufman affidavit, which is in evidence.

Q Now, Mr. Frank, what, if anything, did you have to do with the transaction after the board approved it?

THE COURT: Before you get into that, Mr. Frank, I am a little puzzled. What was your title exactly at the Titan organization then?

THE WITNESS: I always had the same title. I was president and chief operating officer.

Q Who was chief executive officer at that time, Mr. Frank?

A Mr. Robinson.

Q Were you designated to a membership on the board by the Block group?

A That's difficult to assess. I wouldn't have taken the job without a board membership.

Q Were there any other directors who had any relationship to the Block group at the time of this meeting on October 9th?

A I don't believe so.

Q How many directors were there at that time?

A I really don't know.

Q Now, Mr. Frank, what, if anything, did you do on the transaction after the board approved it on October 9th?

A I did relatively little on the transaction. I tried to maintain an operating relationship with Mr. Faggen so that, if and when the acquisition were completed, we would have gotten up to speed a little bit and wouldn't have to start afresh. And I suppose I was brought up to date by both sets of attorneys. Other than that, very little. The bulk of my duties at Titan at that time were to handle the ongoing operations, which was a fulltime job.

Q Who were the attorneys handling the transaction for Titan?

A Well, I looked to Mr. Kaufman for the strategy and I looked to the Robinson firm for the technical completion of the deal.

Q Had you ever worked on an acquisition prior to the acquisition of the Faggen Companies?

A No, sir.

Q Does that include all of your prior employment experience up until that point?

A To the best of my knowledge.

Q Now, did you make any inquiry into the adjustments which Mr. Faggen had told you about in connection with his 1968 earnings?

A None other than what I have already indicated.

Q Did you ask any of the accounting people in the

Titan organization to look into those items?

A Well, it was suggested to me by the financial people, Russo and McIntyre, that as the ordinary course of things, before the closing, that they would have to do some work on the financials, and I also suggested to somebody Mr. Robinson or Mr. Faggen, that it seemed logical to have Peat, Marwick, which was our external auditor, to look into the Faggen financials.

Q What was the result of that suggestion?

A I think it fair to say that it was characterized by a pretty vehement rejection. I don't know about the concept, but certainly a vehement rejection of Peat, Marwick.

Q By whom?

A By Mr. Faggen because they -- which I should have realized at the time. They had and have a very active actuarial division which was a direct competitor of Mr. Faggen's.

Q Mr. Frank, at the time you were conducting these negotiations with Mr. Faggen and the Robinson firm was handling this deal, did you know what business the Robinson firm had been doing with Mr. Faggen previously, if any?

A Mr. Powers, it is really not a hundred per cent accurate to say that I was doing the negotiations. I had frequent contact.

Q Let me rephrase the question.

What, if any, knowledge did you have about relationships between the Robinson law firm and Harold Faggen in or about October of 1968?

A I knew that there was a long and ongoing relationship in the sense that they served some common clients. I knew that union work was a pretty big part of the Robinson law practice. I knew that there was respect and affection over and above the professional relationship. And other than that, I knew that the Robinson firm had done some legal work for Mr. Faggen only on the matter of the lease of his premises.

Q Did you know that the Robinson firm had been handling personal litigation for Faggen at that time?

A No, sir.

Q Did you acquire any knowledge of Faggen having been a partner with several partners of the Robinson law firm in several real estate ventures at that time?

MR. COOPER: I object to that, if your Honor please.

THE COURT: I really think that this witness is the last person who needs words or thoughts put into his mouth.

MR. POWERS: Question withdrawn, your Honor. Thank you.

MR. POWERS: No further questions, Mr. Frank.

CROSS EXAMINATION

BY MR. COOPER:

Q Is it safe to say, Mr. Frank, that your recollection of events which occurred five and a half years ago is rather hazy?

A No.

Q Well, you read your testimony over before you testified here today, your deposition?

A I read the deposition, yes.

Q Did you read any other depositions besides your own?

A No.

Q You read your affidavits?

A Yes.

Q And you read Mr. Kaufman's affidavits before you testified on the deposition?

A Yes.

Q And you read all the other papers at that time too, didn't you?

A If it was included with the Kaufman affidavit, I did, yes.

Q Do you recall, Mr. Frank, that, just to check your memory for a moment, you testified that Mr. Kaufman and Mr. Faggen had quite a few meetings? Do you recall that?

A No.

MR. POWERS: Do you have the page, please?

MR. COOPER: Yes. Page 60 of the deposition.

Q (Reading)

"Q Were there subsequent meetings at which the Faggen matter came up and at which you, Robinson and Kaufman were present?

"A I don't recall. Of course, I wasn't present at all the meetings between Faggen and Kaufman. They had quite a few without me."

Do you know that they only had two?

A That's the way it seems to me. They had two before the board meeting.

Q Now, this was before the meeting of October 2nd.

A Yes.

Q They had quite a few before October 2nd?

A No, I didn't say that. I said that I agreed that I thought they had two before the board meeting.

Q Well, Mr. Frank, starting at page 58.

"Q Do you have any knowledge as to whether you ever met with Ed Kaufman and Ben Robinson prior to the summer of '68 at which you discussed the affairs of Faggen?

"A I'm pretty sure we did.

That's before the summer, right? You discussed

Faggen with Kaufman and Robinson. Do you recall that question and answer being made?

A I recall that. I don't know what my definition of summer is. I suspect --

Q All right.

"Q Do you know where that took place?

"A It would be in Mr. Robinson's office, probably.

"Q Would that be before the first meeting, which the Block interests said was premature?"

We'll get back to that in a minute.

"A I don't know."

By the way, when did you have that first meeting with the Block interest in which you discussed with them the possible acquisition of Faggen?

A As I believe I testified, we had very frequent meetings and we discussed the entire operational aspects of Titan, tried to have them at least every week or every two weeks, and it is really very difficult for me. If the matter -- you know, my opinion is that after Mr. Robinson introduced Mr. Faggen to me, that I would have reported on that at the next meeting of the Block group.

Q And that would have been sometime in July or August of 1968?

A Or June.

Q Or June?

A Yes.

Q All right. And at that time, the first meeting, they said it was premature to talk about acquisitions, according to this answer.

A Yes.

Q Reading on page 58:

"Q Do you have any recollection of what was said at the meeting between yourself and Mr. Kaufman?

"A No. It must have been just a general thing, in which Ben, who had considerable enthusiasm for this move, talked to Ed.

"Q What I want you to do, Mr. Frank, is this: I would prefer, if you don't have a specific recollection, that you say so rather than to simply assume that something occurred.

"A I understand what you want me to do. It is just very difficult. We had many meetings. This was in essence a new company, with a new management and a new controlling stockholder group, and there were frictions and an absence of communication. There were just a lot of meetings, as you can imagine in such a situation. It was extremely difficult to try to categorize them all out five years later.

"Q But in any case, to the best of your recollection, prior to the summer you had been participating in a meeting between Mr. Robinson, Kaufman and yourself in which the Faggen matter came up.

"A It seems to me we had long, lengthy meetings on a great variety of topics and this was one that came up.

"Q Do you have any recollection of what transpired at that meeting when it did come up?

"A No."

Page 60:

"Q Any discussion about the kind of business that Mr. Faggen --

"A I assume Mr. Robinson was trying to be useful to this new group. He wanted to show that he was on the team, so to speak, and was looking around for items which had the best interests of Titan at heart. So I dimly recall, I think, that he said, 'I put Tony in touch with someone. It might be extremely interesting.' And he let it go at that.

"Q Were there subsequent meetings at which the Faggen matter came up in which you, Robinson and Kaufman were present?

"A I don't recall. Of course, I wasn't present at all the meetings between Faggen and Kaufman. They had quite a few without me."

Do you remember those questions being asked?

A Yes, I do.

Q Now, when you said they had quite a few without you, you now know they only had two.

A Certainly not.

MR. POWERS: Objection.

Q Are you saying that Faggen and Kaufman prior to September 6th had any meetings?

A Excuse me. Maybe I misunderstood your question. I believe that that testimony you are reading says meetings between -- when I say "they," I mean Robinson and Kaufman.

Q Your answer was, "Of course I wasn't present at all the meetings between Faggen and Kaufman."

A Then it was a misstatement on my part. I meant Robinson and Kaufman.

Q I see. All right.

Mr. Frank, have you had occasion to reread the minutes of October 9th?

A Yes.

Q The minutes themselves, Mr. Frank, do not reflect any discussion with regard to the earnings of the Faggen Companies, do they?

A They reflect what they reflect.

Q I would like you to be sure of your answer. If

you have read it, they only talk about the nature of the business. They don't say anything about earnings, do they?

A If they don't, Mr. Cooper, then they don't.

Q You recently reread it. Do they talk about the earnings of the Faggen Companies?

A I don't recall that they do.

Q Yet in that same set of minutes, Mr. Frank, on the same day there were discussions with respect to acquisitions. One was Wolf & Maclow, page 192A, then there was a discussion -- and as to that transaction there was a discussion with respect to the finances of that transaction, wasn't there?

A Well --

MR. POWERS: I object to that question. It is calculatedly misleading.

THE COURT: Mr. Powers, you amaze me. No lawyer is going to fail to be calculating in the way he couches his questions. So what? What you are really saying is that you are objecting because he is comparing financials, which is a broad statement, to earnings.

MR. POWERS: Yes.

THE COURT: No wonder we have had this case litigated for years with no results.

Start over again, please.

Q Mr. Frank, do you recall discussing negotiations

with Eugene Colman, who was formerly with Hanover Equities, a real estate firm?

A Yes, sir.

Q Do you recall setting forth in your discussion with the board on that day his present sales average between 125 to 150 thousand dollars a month with a pretax profit ranging between 30 and 40 thousand dollars?

A Yes, sir.

Q Do you recall discussing as to that transaction what he wanted for his company and he feels his company should earn between $400,000 and $500,000 a year pretax? Do you remember discussing that with the board in connection with that transaction?

A Yes, sir.

THE COURT: At the time of the fall of 1968, Mr. Frank, would it be fair to say that Titan was embarked upon a relatively aggressive program of acquisitions?

THE WITNESS: Yes, sir, it would be fair.

THE COURT: Forgive me, Mr. Cooper.

Q Would it also be fair to say, in that connection, Mr. Frank, that it was the intention of the Block group to use the assets of the Titan group for making acquisitions?

A Yes, sir.

Q Of the Titan group making acquisitions on behalf

of Titan.

A Yes, sir.

Q Now, the structure of the Faggen acquisition did not require the use of any of Titan's assets in order to make it, did it?

A If you mean there was a cash outlay, there wasn't. But the issuance of debt is a material balance sheet item.

Q Mr. Frank, prior to negotiations with Kaufman, you knew, did you not, that there was a $1,300,000 securities portfolio in the Faggen companies?

A More or less, yes.

Q And it was important for Titan to get ahold of that in order to get some liquidity, wasn't it, at that time?

A That is not correct.

Q Well, was there a severe cash flow problem in Titan around September of '68?

A No, sir . If I can expand my answer --

Q Wait a minute. Let me just get something.

MR. POWERS: I think the witness should be permitted to complete his answer, your Honor.

THE COURT: He doesn't have to permit him under these circumstances. You can do that on redirect, if you so choose.

Anything else, Mr. Cooper?

MR. COOPER: Yes, your Honor.

THE COURT: Why couldn't we take a short recess so that you gentlemen can make up your mind what you want to ask here? Would you like that so that you can find out whatever you are looking for?

MR. COOPER: I think I have what I want, Judge.

THE COURT: All right.

BY MR. COOPER:

Q Mr. Frank, when you saw this Exhibit 8 in Mr. Robinson's office, do you notice that this so-called projection begins in the year 1969 (handing)?

A Yes. I didn't testify I saw it in Mr. Robinson's office.

Q Where did you see it?

A Either in Mr. Robinson's office or mine.

Q Did you ever have a copy of it?

A I don't know.

Q Well, who showed it to you?

A Mr. Robinson, as I testified.

Q Mr. Faggen never brought it to you, did he?

A Not to my knowledge.

Q Whenever and wherever you saw it, do you notice, Mr. Frank, that there is an item on that exhibit entitled

"Investment income?"

A Yes, sir.

Q Do you notice that the projection deals with investment income? In other words, the projection is shown showing investment income as one of the items as part of the projection, isn't that a fact?

MR. POWERS: Objection. I think the exhibit speaks for itself.

THE COURT: Sorry. I do not agree.

Do you understand the question, Mr. Frank?

THE WITNESS: I do in a sense, your Honor. Two-thirds of the exhibit is taken with arriving at total pretax operating income and then there is one line that says investment income. That's why I have difficulty answering.

THE COURT: Yes. But I think the question in thrust comes down to this, and I would be very interested in your answer, sir, if you are able to give it at this late date: whether or not you understood that exhibit and the projected earnings thereon shown to be based in part upon investment income.

THE WITNESS: No, sir.

THE COURT: You do not.

THE WITNESS: No, sir.

BY MR. COOPER:

Q You will notice, Mr. Frank, that it begins with operating income in '68 of 570,000?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q And it also begins -- that is a projection where there is already fed into or factored into this exhibit a projection of increase, isn't there?

A Yes. Except --

Q The 1969 figure shown shows an increase by reason of a factor of -- I don't recall what the exhibit says at the top, but whatever the factor is, it shows a factoring of income on operating basis and it shows a result of 570,000 for the year '69 on operations, isn't that so?

A It doesn't -- my recollection is that does not show an increase. My recollection is that the figure for 1969, 570, was deliberately picked as being flat from 1968.

Q Well, did somebody explain that to you?

A Yes.

Q Who?

A Mr. Faggen.

Q He explained this to you?

A Yes.

Q This particular exhibit?

A Yes.

Q When did he do that?

A I don't know. But I recall that the reason -- I haven't seen this exhibit from this morning. But I recall that the figure 570 for '69 is the same for 1968 because Mr. Faggen felt that the time and effort required to bring the computer projects on stream would make '69 earnings flat.

Q May I see that?

Doesn't it start out by saying, "Fiscal years ending in '69," and then it shows volume in the preceding year 10,956? It shows the volume in the preceding year, which would mean '68, isn't that so?

A I don't know.

Q In showing what '69 is, it shows volume preceding year, which would mean '68 (indicating).

A Yes, sir.

Q And then it shows this number.

A Yes.

Q And then it shows increase at fifty percent pretax.

A Yes, sir.

Q And then 550, and then it shows increase at forty percent, and that wasn't used for that figure. So the total amount is 1150, or 1,150,000, isn't that so?

A Yes, sir.

Q Then you take that down, so that there is a factoring in of fifty percent pretax.

A Sir, that part is left blank in 1969 because the intention --

Q It is forty percent that is left blank, increase to fifty percent --

MR. POWERS: He is not permitting the witness to answer.

A It is blank in all these areas. Only for 1969 is the only year that is blank. For forty percent, for fifty percent, for forty percent again.

Q Well, that is the pretax profit? Is that the column that you are looking at?

A I am looking at all the columns that are blank for 1969.

Q It says pretax profit preceding year increase at fifty percent rate.

A Yes.

Q That is the column that is blank. But above that, increase at fifty percent pretax is 55, isn't that so?

A 55,000.

Q That is correct.

A Yes, sir, which is five percent of the preceding

year.

Q Do you notice it says at the top "Income projections, assuming that current business will increase five percent a year."? So he is factoring in the increase for 1969, isn't he?

A That's what the heading says. My recollection is, if you are interested, that the 1969 figure is the same as 1968 because it was projected to have flat earnings due to the additional expenses.

Q Well, in any case, Mr. Frank, you don't recall whether you spoke to Mr. Faggen about that prior to October 9th or not, do you?

A No, not specifically.

Q Now then, did you transmit this exhibit, which is the memorandum, to the members of the board? Did you hand this memorandum to the members of the board?

A I testified in my deposition that I couldn't remember, and I still can't remember whether I excerpted it, read it or passed it out. I don't know.

Q Now, they are not attached to the minutes in any case, are they?

A No.

Q When you discussed with the board what the earnings of the Faggen Companies were, did you discuss with them

that these companies had earnings on a restated basis of more than $550,000? Or did you tell them that the earnings were earnings which were the actual net income of those companies?

A If I give you a specific answer to that question, I would be misleading this Court. I generally do not remember which of those I did.

Q Well, certainly, if you would have told the board that the net income of these companies was $550,000, that would have been a misleading statement to the board, wouldn't it?

A No.

Q Well, you knew that thiscompany had reported earnings for 1968 of only $560,000, didn't you?

A No.

Q 365, rather.

A No. I knew that that's what they paid taxes on.

Q That's what I'm getting at. They paid taxes on 365, right?

A No. But you said income. And I considered that to be quite different.

Q All right. Dealing with income, did you tell the board that the income of these companies were $550,000?

A That's my recollection.

Q Did you tell them that that was a restated income?

A I just testified that I really don't recall what I said.

Q If you didn't tell them that it was restated and if you just told them that that was income, you would have been misleading the board, wouldn't you?

A I don't see it that way at all.

Q Mr. Frank, you knew, did you not, that, for example, an item like personal accounting fees, which was annexed to the exhibit, was not the income of these companies for 1968, didn't you know that?

A Sir, can I give you an answer to your question?

Q I think you had better.

A What is important to the board of directors is what will this acquisition do to the earnings, to the augmentation or dilution, once we acquire it. That's what is important.

Q That may be what you may regard as important, Mr. Frank. But the question that I'm now putting to you is: All you had from Mr. Faggen was a restatement of earnings, isn't that so?

A That is correct.

Q You also had his income tax returns, didn't you?

A If I did at that point, I don't recall.

Q You certainly had them by the time you signed the contract on behalf of this company on December 2nd, didn't you?

A That is correct.

Q And you knew that somewhere along the line that these companies had actually reported income of only $365,000.

A When you say "reported income," do you mean --

Q Tax reported income.

A You mean reported to the Internal Revenue Service for tax purposes, that income, yes.

Q And you also knew that if you had told the board that these companies had net income of $550,000 without telling them that it was restated, you would have been telling them something which, by the very contract documents you knew was not true, wouldn't you?

A I don't know that it was incumbent upon me to tell the board that there was a difference between the income tax returns of this company and the accounting effect upon Titan after acquisition.

Q Well, so far as Mr. Faggen was concerned, he wasn't on the board, was he, on October 9th?

A No, sir.

Q So he couldn't have told them anything, could he?

A No, sir.

Q And all he told you about 550 or 570 was on a restated basis, right?

A Yes, sir.

Q He wasn't telling you that these were earnings which were reported earnings, was he, 570?

A It was a privately held company. They never reported earnings. I don't know what you mean by "reported earnings."

Q Well, the reported earnings on the income tax returns are what I'm talking about. He never told you that he reported to the income tax people earnings of $570,000, did he?

A No, sir.

Q As a matter of fact, on the exhibit it speaks of an adjustment to the basis which will prevail after acquisition and goes back four years, right?

A Yes, sir.

Q So right on the face of that document, anyone looking at it would have to know that there were adjustments in order to reach these figures, isn't that so?

A True. Certainly.

Q One of the adjustments was an item for personal accounting fees, which would never have been shown as part of

the earnings of his private companies since he had been taking those personally, isn't that so?

A Exactly.

Q All right.

Now, then, in addition to that, you only knew about one other adjustment, you said, and that was one for pension overfunding?

A Yes, sir.

Q That, too, would have had to have been taken out of the earnings of the company and put back into the company, isn't that so? I'm sorry. Withdraw the question.

The pension overfunding was an item which had been charged as an expense for the business in these four years of '64 through '68, and if the company had been owned by Titan beginning in '64, that item would not have been charged as an expense, so it would go to increase the earnings of the Faggen Companies, isn't that so?

A Yes, sir.

Q Now then, if there were only the item of pension overfunding and the personal accounting fee, you knew that between the two of them the only adjustments there totaled approximately a hundred thousand dollars, right?

A I'm not sure that I ever knew the amounts of the adjustments.

Q Well, you could have seen it, couldn't you?

A (No response.)

Q Income tax returns.

A No. How could I have seen the income tax returns?

Q The pension contribution is right there on the tax return.

A I could have seen that on the tax return. But I certainly couldn't have seen the personal accounting fees.

Q B ut the personal accounting fees were shown on the piece of paper shown; it was all pro forma.

A That wasn't shown to me.

Q But doesn't it refer to personal accounting fees?

A No, sir. What was shown to me was Exhibit 5-B.

MR. POWERS: It is Exhibit 3 in the trial.

THE WITNESS: Excuse me.

BY THE COURT:

Q Mr. Frank, in that regard, do you recall that Mr. Faggen ever showed you copies of the Faggen Companies tax returns at any time prior to October 9th?

A No, sir.

Q Did Edmund M. Kaufman, the Irell & Manella lawyer and later the chairman and all of that, ever show you any tax returns of the Faggen Companies prior to the October 9th board meeting?

A No, sir.

Q In other words, you never saw those tax returns, apparently.

A Except at the closing, your Honor.

Q You did see them at the closing?

A Yes. But I knew relatively little about acquisitions, but the one thing I knew --

Q No. I am not suggesting otherwise. I am just curious that it wasn't until the closing that you were shown the tax returns.

A The reason, your Honor, is that I believe I was told, and if I wasn't told I believed it myself, that they were reasonably irrelevant because it was a privately held company.

Q Well, I understand your point in making that distinction. But there is evidence in this case that Kaufman received from Faggen copies of the tax returns of these four firms for several years prior, and I was somewhat taken aback to learn that Kaufman never showed those to you at all.

A Sir, when I --

Q I understand your point and your distinction, and I do not mean to be --

A I wonder if I can make this one very short point. When I took this position, I had one basic

requirement, and that is that I felt that, with the operational needs of the company, we were going to use all my time, A, and B, that I had no acquisition experience. So, when I took the job, I said, "Will you get acquisition help?" And they said yes. So that really was a delegated function.

Q Yes. I know. I am not criticizing you at all. That is not the point of my question. I am just a little bit curious that the so-called expert didn't show it to you.

A No, sir.

THE COURT: All right. Anything else, Mr. Cooper?

MR. COOPER: I just wanted to continue with the line I had for a moment.

BY MR. COOPER:

Q Mr. Frank, you will notice on this exhibit there is an item "Harold Faggen Personal" for the four years beginning in '65 through '68 runs 34,8, 34,8, 35,240, 35,240.

A Yes, sir.

Q Did you ask a question as to what that was?

A Either I was told or I asked a question.

Q What did you find out?

A Those are the personal accounting fees.

Q All right. So that you knew that at the time you went to the board meeting with this that you had personal accounting fees of $35,000 for '68, which were not part of

the earnings of the Faggen Companies, right?

A Not part of the Internal Revenue reported earnings.

Q Yes. Okay. And you also know only about pension overfunding, right?

A Yes, sir.

Q Didn't you ask Mr. Faggen what other items go into these adjustments?

A No, sir.

Q How did you come to a number like $570,000? Didn't you ask that question?

A No, sir.

Q Did anybody on the board ask: Was this restated earnings or was this reported earnings? Anybody ask that question?

A If they did, I don't recall it.

Q Did you tell the board that Mr. Faggen had had any conversations with you or with Mr. Kaufman or with anybody in which an explanation was made that this was a restated earning?

A If I did, I don't recall.

Q Did you, Mr. Frank, after the meeting of October 9th, ask Mr. McIntyre to make an analysis of the accounts of the Fagger. Companies?

A Either I asked him or he voted that it should be

done, one or the other.

Q All right. You are aware, aren't you, Mr. Frank, that Mr. McIntyre has submitted an affidavit in this case in which he states that he gave you a report and that that report was that he had analyzed the adjusted figures for you in connection with this restatement of earnings? Do you recall reading his affidavit to that effect?

A No, sir.

Q Well, do you deny that you told Mr. McIntyre to check out the adjustments?

A I just testified that either I asked him or he voted that it should be done.

Q Well, do you remember in your affidavit, at page 502A, you said, "I have reviewed the affidavit of my former employee Richard McIntyre, submitted by Harold Faggen, whose affidavit I have also reviewed, and wish to set the record straight on a few crucial facts."?

So that you do know from reading his affidavit that he said in his affidavit that he was instructed by you to check out the adjustments, don't you?

MR. POWERS: Objection. Why doesn't the witness have the opportunity to look at what McIntyre said? He is being asked a question in the abstract.

THE COURT: I would think that is fair enough.

MR. COOPER: Okay, I will be glad to do that.

THE COURT: Would you mind if we took a five-minute recess at this point? I did not realize that you had so much more. Perhaps you can use the five-minute recess to get organized to complete this.

MR. COOPER: Yes, Judge.

THE COURT: All right.

(Recess)

THE COURT: How much longer are you going to be?

MR. COOPER: I would imagine about half an hour, Judge.

THE COURT: I am afraid I am not going to have that kind of luxury. It is a quarter past eleven already. Granted you have had some interruptions, but you have been going now for three-quarters of an hour without that.

MR. COOPER: I will try to speed it up, then, Judge.

THE COURT: I hate to do it, but things are beginning to tighten up. You remember I said last night that as the morning waxes on I am going to have more problems, and I can see them right now, some of them.

But you go ahead and do the best you can. I know Mr. Frank wants to get home and you want him to go home. But let's see.

MR. COOPER:

Q Mr. Frank, now having read Mr. McIntyre's affidavit, does that refresh your recollection with respect to what he said you assigned him to do?

A Yes.

Q And you say it is not at variance?

A Right. I testified earlier either I asked him to do it or he suggested to me it should be done.

Q And that was to look into the adjustments.

A To look into the books.

Q Did he also discuss with you and tell you that the adjustments look okay?

A I don't know.

Q You don't recall that?

A No.

Q All right.

Now, then, Mr. Frank, I show you Defendant's Exhibit D, which is the proxy material for 1969, and ask you if you were president of Titan at the time that this was issued.

A It was issued in 1969. I was president.

Q And you were also a member of the board at that time, were you not?

A Yes, sir.

Q You will notice, Mr. Frank, that on page 3, I believe, in a description of the Faggen acquisition, it states, "The amount of convertible installment notes delivered to Mr. Faggen was arrived at as a result of an arms length negotiation between the parties, with each side separately represented by counsel, based upon the financial condition and past earnings history and after a thorough investigation of the business assets of the companies acquired from Mr. Faggen."

Do you recall reading that at the time that this proxy statement was issued?

A No, I don't recall it. But clearly I must have.

Q Does it fairly state the truth?

A I think so.

Q Can you tell us, then, Mr. Frank, at the time that you had executed these contracts between yourself and Mr. Faggen, did you ask for any representations or warranties that you didn't get with respect to the financial condition of this company?

A No. I would not have had enough experience to know what the representations and warranties were.

Q But it is a fact, isn't it, that you were participating in the contract negotiations between Mr. Scheib and members of the Robinson firm and Kaufman over the period

between October and December?

A I think to a very limited extent.

THE COURT: I am sorry to do this, Mr. Cooper, but apropos of what I mentioned, I am going to have to interrupt you. Maybe,if I interrupt now, I can give you a little more latitude in a few minutes.

MR. COOPER: Fine, Judge. I would appreciate it.

(Recess)

BY MR. COOPER:

Q But do you recall, Mr. Frank:

"Q Do you have any recollection about discussing any of the provisions in the contract documents with anyone on behalf of Titan?

"A Well, during the course of the drawing of the documents" -- Page 177 -- "I can remember there was a great deal of discussion about representations and warranties.

"Q What do you recall about that?

"A Just typical. It seemed to me at the time, and still seems to me, a typical legal wrangle, where the buyer wants everyone he can get and the seller wants to give as few as he can.

"Q Did you have any warranties that the buyer wanted that he didn't get that he asked for?

"A No. But I know that Scheib" -- that means Mr.

Scheib; he was the attorney for Mr. Faggen.

A Yes, sir.

Q (Reading)

"Q -- was most vociferous on this whole question of representations and warranties."

Do you remember those questions being asked and those answers being given?

A Yes, sir.

Q Then do you recall this question; Page 178:

"Q What specifically did the buyer want?

"A I really can't remember. I'm sorry. I can't remember. I'm sure that Rosen or Kaufman can.

"Q You specifically didn't remember any specific warranty that you didn't get.

"A No. That was my first closing at an acquisition and I was really in no position to be injecting my expertise."

Do you remember those questions and those answers being given?

A Yes, I do.

Q And so is it a fair statement to say, Mr. Frank, that there was no representation and warranty that you wanted that you didn't get in these contract documents?

A Well --

Q As dealing with financials.

A Inasmuch as they didn't ask for any, it is difficult for me to answer your question.

Q Well, all right.

With respect to Peat, Marwick, you knew that they were a competitor of Faggen's didn't you?

A No. I testified earlier I should have known, because it had been pointed out in Exhibit 3. But I --

Q It is specifically stated in there, isn't it?

A That is right. I should have known,but I did not know.

Q Would you say that it was a fair position for Mr. Faggen to take that since they were their competitors, he didn't want them coming in and auditing the books?

A Well, it certainly seemed like a logical basis for excluding them at the time.

Q And do I understand, too, that you wanted Peat, Marwick to come in and do the audit and, at the time, you wanted them to build back on the tax returns against these adjustments, is that right?

A That's what I would have asked them, yes.

Q So,not having Peat, Marwick, isn't it safe to say that you did the same thing with McIntyre; you said, "Look, we can't get Peat, Marwick. McIntyre, why don't you do it?"?

A I don't know whether it is safe to say.

Q You just don't recall that you did it?

A Well, I look upon Mr. McIntyre's function and Peat, Marwick's function as a lot different.

Q Well, let's put it a little differently then. If it was important enough for you to have had Peat, Marwick do it, would you say to this Court that you would not instruct anybody to do it?

MR. POWERS: Objection. What does "it" mean in this context? I don't think the witness knows.

MR. COOPER: Build back on the tax returns and the adjustments.

THE COURT: In any event, why don't you rephrase the question? From your own point of view, there was another slight infirmity,. I suspect.

Q Mr. Frank, first of all, do you recall Arthur Andersen Company being discussed with Mr. Faggen?

A No, sir.

Q Do you know that Mr. McIntyre has stated that, so far as Faggen was concerned, Arthur Andersen Company was okay?

A No, sir.

Q You don't know that. Okay.

But going back now, you wanted Peat, Marwick to build up on the adjustments of these tax returns, right?

A That's one of the things I would have asked them to do, yes.

Q So that you were aware then, as of October, that there was a need for verification of the adjustments to see whether the restatement of earnings was as shown in that exhibit, isn't that true?

A I think, with the state of my knowledge at that time, I realized we were spending multi-millions of dollars without having somebody independent looking at the books.

Q Not only looking at the books, but checking out the adjustments against the tax returns, isn't that so?

A That would have been one of the aspects of looking at the books.

Q All right.

Now, then, as important as that is, are you saying that not able to get Peat Marwick, that your recollection was that you didn't ask anybody to do it?

A Other than possibly asking Mr. McIntyre instead, which I don't consider to be the same.

Q All right, that's fine.

And, finally, you would not have made the statement in the proxy statement such as appears there about full investigation unless you had been satisfied prior to closing that a full investigation had been conducted, would you?

A I'm not sure that I made this statement. But I certainly read it and allowed it to be printed.

Q And you wouldn't have allowed it to be printed if it wasn't true, would you?

A Correct.

MR. COOPER: I have no further questions.

THE COURT: Any redirect?

MR. POWERS: Yes. Just two quick questions, your Honor.

REDIRECT EXAMINATION

BY MR. POWERS:

Q What was the cash position of Titan, as best you can recall, in the fall of 1968?

A Well, really all that I can recall is from a reading of the minutes of July and October 1968, which indicates that the shopping center sale of about four million dollars cash proceeds was ready to close.

Q Was Titan short of cash in the fall of '68?

A It was prior to the closing of the shopping center deal.

Q And when was the shopping center deal closed?

A Late in 1968.

Q Do you recall when the tax return for the four years on the Faggen Companies became available in connection

with the acquisition?

A The first time I ever saw them was on the day of the closing.

Q Do you have any knowledge as to whether Kaufman had them for the whole four years prior to the time you saw them?

A The only thing I remember with Kaufman was that he had a blanked out income tax statement for one of the companies after his first or second meeting with Mr. Faggen.

Q And that was just for one year, wasn't it?

A I believe so.

MR. POWERS: Thank you. No further questions.

RECROSS EXAMINATION

BY MR. COOPER:

Q Do you know whether Mr. Kaufman testified here yesterday that he had tax returns for four prior years before he met with Mr. Faggen?

MR. POWERS: Your Honor, I don't think Mr. Kaufman testified to that at all.

THE COURT: I am not going to argue that with you. But I am going to take your statement, Mr. Powers, as an objection, which I will sustain as to form.

MR. POWERS: Thank you.

THE COURT: I could not even understand whether

this was an argument, Mr. Cooper, or whether you were addressing a question or what you are doing.

MR. COOPER: My question --

THE COURT: Whatever you want to do, put it to the witness in the form of a question.

Q Mr. Frank, two things. Did you hear from Mr. Kaufman that he had the four years of tax returns when he went over figures with Mr. Faggen?

A When?

Q At any time.

A I don't know. No.

Q Do you know that Mr. Kaufman has testified that you and he were at Mr. Faggen's office on October 2nd, at which time the negotiations took place?

A No. I'm not aware that he testified to that effect. But I was not there.

Q You say definitely that you were not there.

A Yes, sir.

Q Is it a fact, Mr. Frank, that following the meeting of October 2nd, that you had asked of Mr. Kaufman whether he had checked the figures of the Faggen Companies against the adjustments in order to reach the restated earnings figure?

A Do I recall asking him to do that?

Q Do you recall if he told you that he had done that?

A No.

Q Do you recall his having told you that he had checked the figures with Faggen and that the numbers checked out?

A No.

THE COURT: Mr. Powers?

MR. COOPER: I just wanted to check something.

THE COURT: I know. But every time you turn around, one of your helpmates there comes up with another brilliant thought. And my experience is that these thoughts become increasingly less brilliant as the day wears on.

MR. COOPER: This will be the last question, I promise you, Judge.

THE COURT: Don't make any rash promises. You are too nice a fellow.

BY MR. COOPER:

Q Mr. Frank, is it your testimony that when you spoke to Kaufman following the meeting of October 2nd with Mr. Faggen, that you did not inquire of him as to whether or not he had gotten the opportunity to check figures with Faggen?

A As I recall it, he volunteered the information it looked like the company was earning in the area of 550,000.

and at that stage of my experience and his, I wouldn't be presuming to be asking him questions about an acquisition.

Q I see. But you do have a recollection that it was 550 he told you about?

A I said more than 550, I think.

Q But he didn't mention 570 to you, did he?

A No, sir.

MR. COOPER: I have no further questions.

THE COURT: Mr. Powers?

MR. POWERS: One question, sir.

REDIRECT EXAMINATION

BY MR. POWERS:

Q I show you Exhibit 1, which has annexed to it a tax return with the name blacked out. Do you know whether or not Mr. Kaufman had any tax returns for any years and any other corporations involved in the Faggen group before October 9, 1968, the date on which the board approved the transaction?

MR. COOPER: I'll object to the question, your Honor.

THE COURT: I believe I had already asked Mr. Frank about this, so I am a little puzzled.

MR. POWERS: Your Honor, the purpose of the question was, when you asked it --

THE COURT: I am not asking the purpose.

MR. POWERS: I thought you said four years, and the record appears just one year on one company.

THE COURT: I know I did say four years. But that is not the point. He already answered that he didn't see any tax returns.

Isn't that so, Mr. Frank?

THE WITNESS: Yes, sir.

THE COURT: You never were shown even by Kaufman any tax returns?

THE WITNESS: That's correct.

MR. POWERS: And I'm asking him now: Do you have knowledge of Kaufman having received any tax returns other than these, of your own knowledge?

MR. COOPER: I'll object to what he may have known about whether Kaufman received.

THE COURT: I do not see quite how he could either. I think we are asking a tall order, but I will allow it and see what happens.

A No, sir.

THE COURT: I think we can thank you and excuse you before somebody else gets some bright ideas, Mr. Frank. Thank you very much.

(Witness excused.)

THE COURT: I want to see you and Mr. Cooper up here a minute, please, if you don't mind.

(Luncheon recess.)

AFTERNOON SESSION

3:30 p.m.

MR. POWERS: The next witness being called by the plaintiff is Mr. Benjamin Robinson.

B E N J A M I N M. R O B I N S O N called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Robinson, were you the chairman of the board and chief executive officer of Titan in 1968?

A Yes.

Q How long did you hold that office before 1968 and how long after, please?

A Dating back, I think, to the latter part of 1961, part of the time acting chairman and then as chairman.

Q And when did you cease being chairman?

A In the spring of '69.

Q And you continued as a full partner in your law firm throughout this period, did you not?

A I did.

Q Now, in connection with the Harold Faggen Companies acquisition, did you first participate in discussions on that subject in the early summer of 1968?

A Yes.

Q And in those early discussions, were there any discussions on the price to be paid for that acquisition by Titan?

A No.

Q Were there any discussions of the financial statements of tne Faggen Companies?

A Not with me.

Q Was the first time that you heard earnings just prior to Edmund Kaufman coming in to conduct negotiations?

A I can't tell you exactly when, but it was after Tony Frank, the president, had had some meetings with Harold Faggen, and the relationship of that time, when Kaufman came in, I can't tell you exactly.

Q Would it be fair to state that sometime in or about August of 1968 you told Tony Frank that you had Harold to the point where he was willing to show his earnings and get down to business?

A I think it was then.

Q All right.

Now, I take it that the actual approval of this Faggen acquisition took place at a board meeting of Titan on October 9, 1968, didn't it?

A The approval subject to further action of the

executive committee.

Q Right. But you have a clear recollection of that board meeting on October 9, 1968, don't you?

A I have a recollection of that meeting.

Q And the Faggen transaction was explained and presented to the board by Tony Frank, wasn't it?

A Right.

Q He was the president of the company and it was his job to explain the details of the transaction; is that right?

A He was the president and chief operating officer.

Q Right.

Now, do you further recall that the earnings were not in the minutes of the meeting, but they were talked about, the earnings of the Faggen Companies were talked about, at the board meeting?

A You have got two questions. They were not in the minutes, as I recall, and I have a recollection of the discussions of over a half million dollars earnings.

Q Pretax.

A Pretax.

Q And this was discussed by the various members of the board.

A I don't know to what extent and by whom, but I

remember the figure.

Q Right. And it was mentioned to the board by Tony Frank.

A I don't know whether Tony mentioned it or who mentioned it, but it seems to me it came up.

Q All right.

Now, at or about that time you had made it clear to Tony Frank and to Mr. Faggen that you wouldn't represent either Titan or Mr. Faggen in the negotiations, isn't that right?

A Right.

Q And can you recall when you got the first financial statements on the Faggen Companies prior to the board meeting?

A I don't ever remember getting financial statements if you mean by that what I would ordinarily take as regular, full financial statements.

Q Do you recall that Tony Frank asked Mr. Faggen to do a writeup of his company together with four years' earnings on an adjusted basis?

A Tony Frank told me that he had asked Harold Fagger to write up something so that he would be in a position to talk to the board.

Q Right. And I show you Plaintiff's Exhibit 2-A for

identification. Did you supply that document to me from your files in connection with your deposition previously?

A I think so. But you can tell me. Did I?

Q Yes, sir, you did.

A I did.

Q And that's in the handwriting of Harold Faggen, isn't it?

A Right.

Q And that document was then retyped in your office in a typed version; is that correct?

A Right.

MR. POWERS: Your Honor, I would like to offer this. This is the original of Exhibit 2. I have marked it 2-A for identification so that we have the original in Mr. Faggen's handwriting as part of the exhibits in the case.

Do you have any objection, Mr. Cooper?

MR. COOPER: Let me see it.

I have no objection.

xx (Plaintiff's Exhibit 2-A for identification was received in evidence.)

Q Now, at the time Mr. Faggen delivered Exhibit 2-A to you, did he also deliver Exhibit 8?

A I don't think I said that Harold Faggen delivered that to me.

Q Excuse me. What were the circumstances under which you acquired Exhibit 2-A?

A As I told you previously in my deposition, either Tony Frank or Harold Faggen or both together gave it to me. I don't remember.

Q I understand, Mr. Robinson. Now, did Harold Faggen give you Exhibit 8, which you hold in your hand?

A I don't know. I know I had a copy of it, but I don't know who gave it to me.

Q And you had a copy in your files, didn't you?

A Yes.

Q And you supplied that copy from your files to Titan for the first time at your deposition; is that correct?

A To Titan?

Q To me representing Titan.

A To you, yes.

Q At your deposition.

A I assume Titan had a copy.

MR. POWERS: Mr. Cooper, I ask you if we could stipulate that Exhibit 8 is in Mr. Faggen's handwriting.

MR. COOPER: Yes.

MR. POWERS: So stipulated.

THE COURT: Exhibit what?

MR. POWERS: 8. That projection is in Mr. Faggen'

handwriting.

THE COURT: All right.

Q Now, Mr. Robinson, in addition to those two documents, did you receive from Mr. Faggen an organizational table, which we have called 2-B for identification (handing)? I ask you to note that it was supplied to us from your files.

A As I keep telling you, I don't know who gave these to me, but I assume it came either from Tony Frank or from Harold Faggen.

Q Thank you.

A Somebody gave it to me.

MR. POWERS: I would like to offer it in evidence. Do you have any objection?

MR. COOPER: I have no objection.

Q 2-B was supplied to you from whatever source at or about the same time as you received 2-A; is that correct, the handwritten memo?

A I don't know when it was supplied to me. I know it was in my file.

MR. POWERS: Thank you.

xx (Plaintiff's Exhibit 2-B for identification was received in evidence.)

Q Now, after 2-A was typed up, you read a copy of

it, didn't you?

A Yes.

Q And in that connection, did you make some notations on Exhibit A to that document and supply a copy of those notations to us at your deposition from your files, which we have marked 3-A for identification (handing)?

A Well, on this sheet are some notations. But when they were made I can't tell you, because there are no dates.

Q Now, first let's see if we can identify the handwriting. There is a phrase "without investment income." Is that your handwriting, Mr. Robinson?

A I think so.

Q In pencil there are some other notations, "profitable," and two other things. Are those in your handwriting?

A Yes.

MR. POWERS: I would like to offer this in evidence, if you have no objection, Mr. Cooper.

MR. COOPER: I have no objection.

xx (Plaintiff's Exhibit 3-A for identification was received in evidence.)

MR. POWERS: The reason it is marked 3-A, your Honor, is that it is a piece of Exhibit 3. I didn't want to start with a new number. It is the accounting memorandum piece of Exhibit 3.

Q And this 3-A is from your files; is that correct, Mr. Robinson?

A Right.

Q Now, Mr. Robinson, I show you an exhibit which we call 3-B for identification, which involves some notations, and I ask you only with respect to the third page of that exhibit, which is the same page as Exhibit 3-A, which we have just looked at. My question to you, sir, is, the phrase, "without investment income," written in pen, is that your handwriting?

A It looks like it.

MR. POWERS: Your Honor, I would only like to offer, subject to connection, this entire exhibit now as 3-B because it deals with some writings by accounting personnel in the companies, and I'll put it in as a whole exhibit when I have them on the stand. But I wanted to establish that this was Mr. Robinson's handwriting on part of the exhibit.

THE COURT: All right.

MR. POWERS: Which is the third page. So if I could offer it subject to connection, I would appreciate it. It is 3-B.

MR. COOPER: If counsel would concede that the paper that you are offering is the original of what you have

designated, I believe, as 3-A --

MR. POWERS: Yes. I am trying to establish that. That's why I'm putting it in. Thank you.

MR. COOPER: It is not an additional paper. It is the original.

MR. POWERS: This is the origiral in Mr. Robinson's handwriting. The other was a Xerox with some additional penciled notes on it.

xx (Plaintiff's Exhibit 3-B for identification was received in evidence.)

BY MR. POWERS:

Q Mr. Robinson, I now show you the whole memo, Exhibit 3 in its entirety, and refer you solely to these hand notations which show on the Xerox, where it says, "To A. Frank, B. Robinson." Are those notations in your handwriting, sir?

A I think so.

Q Do you recall that the minutes of the board meeting tracked some of the language of Exhibit 3?

MR. COOPER: I'll object to that.

A I don't recall.

THE COURT: Yes. I think we will let that be decided by the factfinder, in any event.

Q If I could perhaps refresh your recollection on

page 33 of your deposition --

MR. COOPER: He hasn't said his recollection needs refreshing.

MR. POWERS: I think he said, "I don't recall."

THE COURT: Yes. But I am saying, aside from that, Mr. Powers, if the language tracks the Faggen memorandum, the factfinder probably ought to decide that. The only room for inquiry here is, it seems to me, if Mr. Robinson has established the draftsman of the minutes, why, that might be something else again. But I do not think anybody contends he drafted these minutes. Did they?

MR. POWERS: No, sir. My only purpose in reading him the question and answer was that he said he didn't recall --

THE COURT: I know that.

MR. POWERS: I follow you. I don't need to go on.

THE COURT: That is Mr. Cooper's idea. That is not the Court's idea. I am saying that I just do not think this is proper. Either I can make that determination from the documentation or I cannot. I hold open to you if you want to ask him if he drafted the minutes and if he, therefore, copied in whole or in part Mr. Faggen's memorandum, that is something else again. But you have not asked him that.

MR. POWERS: I think the evidence this morning was that Mr. Frank and McIntyre drafted the minutes.

THE COURT: That may be. I recall something like that, too. But I hold it open to you. Maybe you do not believe Mr. Frank.

MR. POWERS: Let's go on.

BY MR. POWERS:

Q Mr. Robinson, I take you back to the meeting on October 2, 1968 between Mr. Kaufman and Mr. Faggen. After that meeting, did you meet with Mr. Kaufman and get a report that the parties had reached a deal?

A Did I meet with him when?

Q Shortly after that meeting.

A I have no recollection of meeting him shortly thereafter. I would see him from time to time as he came into New York on different matters. I was not in New York on that weekend of October 2nd.

Q Mr. Robinson, if I could read to you the following questions and answers from your deposition, my basic question as I read them is, are these accurate, page 67:

"Q Where did the discussions take place?

"A If it was on the phone, I was either in my office or in Titan's office. Or if it was face-to-face, it could have been in Titan's office or in my office. But it was in

New York.

"Q Can you fix a date?

"A No.

"Q Can you fix it in terms of whether the deal had been agreed on or not agreed on at the point of the conversation?

"A My recollection is that the meeting after was after Ed Kaufman had negotiated the deal with Harold and Ed Kaufman called me or stopped into the office and said that he had made a deal, he thought it would be a great acquisition.

"Q What else did he tell you?

"A That's all. We didn't get into any details.

"Q He didn't tell you the figures?

"A He may have said that he was giving him 5.5 million worth of debentures. I don't recall."

Now, Mr. Robinson, were those answers that you gave in answer to those questions truthful at the time?

A Absolutely.

Q Now, at the time you read Exhibit 3 -- you did read Exhibit 3, didn't you?

A No.

Q I mean this memo here (indicating). I'm taking you back to 1968 now.

A Yes.

Q You read it after it was typed up, didn't you?

A You mean did I read it then?

Q Yes.

A I'm sorry. I assume so.

Q Now, did you have any negative information, at or about the time you were reading that memo, as to the number of clients in the Faggen business?

MR. COOPER: I object to the form of the question.

A What do you mean by that?

THE COURT: Sustained.

Q Let me rephrase it. At the time you read this memo, did you have any information about the number of clients of the Faggen Companies other than what was in the memo?

A No.

Q And did you have any information on the computer capabilities of the Faggen Companies other than that which was in the memo?

A No.

Q And did you have any information on the financial affairs of the Faggen Companies, their earnings or any other financial matters, other than what you saw in the memo?

A No.

Q Did you take note that there was 571,000 in earnings shown for 1968 after adjustments in that memo, Exhibit 3? Did you take note of that when you read it?

MR. COOPER: I object to the form of the question.

THE COURT: I think you had better rephrase it. I do not understand it.

MR. POWERS: Excuse me.

Q I call your attention to the fourth page of the memo, Mr. Robinson, and the last column for 1968, where it says "totals 571,262." Was there any discussion on that amount in which you participated with either Mr. Faggen or Mr. Frank at that time, back when you received the memo?

A No.

Q Do you recall raising any questions on the amount?

A No.

Q And did you accept the earnings as shown in the memo?

MR. COOPER: I will object to the form of the question, your Honor.

THE COURT: I suppose that -- yes, I agree with that. I think you can rephrase it. The thrust of the question.

Q Did you raise any question with respect to the earnings shown in that memo?

A No.

Q Did you take issue in any way with the accuracy of those figures?

A No.

Q In fact, did you not rely on those figures?

A Rely on it for what?

Q For purposes of the acquisition of the Faggen Companies?

A I assumed those figures were accurate.

Q And when you were reading Exhibit 3, did you notice a substantial list of clients on the last page of the exhibit (handing)?

A Well, I assumed that I read -- I have no recollection, but I assumed that I read all of this document. And since it is in the document, I assume that I saw it.

Q Did you have any discussion on the list of clients with either Mr. Faggen or Mr. Frank?

A I don't recall any.

Q Any information come to you with respect to that list of clients other than what is in the memo?

A No.

Q Do you recall any oral explanation of the memo which you heard from Mr. Faggen?

A I remember a discussion, but I couldn't tell you

now whether I heard it from Mr. Faggen or from Mr. Frank or from both of them together -- we would meet separately and together -- relating to the matter of adjustments, that there were various adjustments to be made, assuming that they were being operated as a part of Titan, a public corporation, and not being operated as a private company. And there were a number of different items which were mentioned.

Q Do you remember any discussions other than the one you have just told us about with respect to material which contributed or explained or modified anything that was in Exhibit 3?

A I don't recall any.

Q Now, Mr. Robinson, what is your specialty as a member of the bar, if any?

A You mean now, or then?

Q In '68, sir.

A Well, I am the senior member of the law firm, and I suppose one problem is to keep track of the lawyers.

I was not actively engaged as I had been previously. I was spending a considerable part of my time as chairman of the board of a public corporation, which I had come into because a client of the office had died, leaving the controlling interest. I was active in pension funds supervision, some labor work, generally would be involved in

various things.

Q Would it be fair to say that your primary specialization in '69 was counseling pension and welfare funds and counseling unions in that connection?

A No, not primary, but a substantial part of my time.

Q You were not an acquisition lawyer in '68, were you?

A No.

Q And you wouldn't characterize your specialty as being a securities lawyer, would you?

A No.

Q You never rendered any advice to anyone on Rule 10b-5 or on registration requirements or anything of that matter?

A No.

Q And you have no accounting background, do you, Mr. Robinson?

A No.

Q At the conclusion of the board meeting on October 9th, would it be fair to say that a deal had been made and there was a businessman's understanding from that point forward that the remainder of the work was essentially Scribner's work, writing papers?

MR. COOPER: I object to the form of the question.

MR. POWERS: Let me rephrase the question.

THE COURT: I would quite agree and I really do not think you need put words in his mouth, in any event.

Q Mr. Robinson, how would you characterize the status of the acquisition of the Faggen Companies as of the conclusion of the board meeting on October 9th?

MR. COOPER: I object to the form.

THE COURT: Do you recall what the minutes say about this, Mr. Powers?

MR. POWERS: Yes, sir.

THE COURT: Do you want him to say that?

MR. POWERS: No. I am really asking the witness to give a businessman's characterization of where the parties stood in their transaction as of October 9th.

THE COURT: May I suggest to you that it would be permissible to ask him what he understood the board's decision was and to what extent it carried on that day.

MR. POWERS: Right.

Q Would you explain to the trier of the facts what you understood the board's decision to be and what it carried as of that date?

A The board's decision was to approve the

recommendation of the president, which I joined; that the group of Faggen Companies be acquired for five and a half million dollars worth of debentures, on terms which had been spelled out; and that the matter should then move forward subject to final approval of the executive committee.

Q After the final contracts.

A Right.

Q Did your firm at that point undertake to draw the contracts on behalf of Titan?

A No.

Q Did your firm first receive a first draft of the contract from Kaufman?

A Mr. Kaufman, who had negotiated the acquisition, was a lawyer in California who was an expert in this field. He went back and prepared the first draft of the contract. Then, to the best of my recollection, he either called me or called directly Mr. Rosen of my office, whom he knew from previous matters, and asked whether Rosen could handle the meetings with Faggen's lawyer on various provisions in the agreement, so that he wouldn't have to come into New York as often as might be required, and this would be done subject to checking back with him, and I said if that's the way he handled it, he could take it up directly with Mr. Rosen, because I was leaving the country and would be gone for a

considerable period of time.

Q Now, Mr. Robinson, Mr. Rosen is Michael Rosen and he was an associate lawyer in your office at that time; is that right?

A Right.

Q He is now a partner.

A Right.

Q And was there another partner in your office who was supervising the matter along with Michael Rosen?

A I don't know if I can use the word "supervisor." Alan Aronson was our senior tax partner, and I'm sure that Mr. Rosen was in consultation with him.

Q All right.

Now, did you give copies of Exhibit 3 or Exhibit 8 to either Michael Rosen or Alan Aronson?

A I don't recall giving any papers to anybody. They were dealing directly with Mr. Kaufman.

Q And did you have any discussions on the substance of Exhibit 3 or Exhibit 8 with either Mr. Rosen, in your office, or Mr. Aronson?

A I don't recall any.

Q Do you recall any of the details in those two documents, Exhibit 3 or Exhibit 8, ever having been the subject of an inquiry of you by Mr. Rosen or Mr. Aronson back

in '68?

A No. As I just explained to you, that I left the country very shortly after this and was gone until approximately a day or two before the executive meeting. I was away totally the month of November and the latter part of October, when they were working on these papers.

Q The closing of the contract was December 2nd; is that correct?

A I think that's when the executive committee met. I think that is the date.

Q Right. And the closing was in your firm's office, wasn't it?

A Yes.

(Pause)

Q Mr. Robinson, I think you testified in substance that you had no contact with the legal details of the transaction because you left the country right after the boar approved it; is that right?

A That's right.

Q But shortly before the board approved it, on or about October 7, 1968, do you remember having a conversation with Faggen on making some additional option shares available to his key employees and also making some of his debentures convertible at fifteen instead of twenty? Do you

remember a conversation with Faggen on that subject?

A I remember there were a couple of items which were still in dispute between them, Tony Frank and Ed Kaufman, and somebody, I think Kaufman, called me and asked whether I would inject myself into it. And that's the extent of my recollection at the moment.

Q I show you Plaintiff's Exhibit 6 for identification and ask you if you would like to read just paragraph 2 and tell us if that paragraph 2 is an accurate summary description of the contact you had in or about October 7, '68.

(Pause)

A This apparently is a memorandum by Tony Frank?

A Right, to Kaufman.

A If he says that's what I said, I assume I did.

Q Does it seem accurate to you upon reading it?

A Vaguely I recall. I recall the items. I don't remember the specific figures.

MR. POWERS: All right. May I reoffer 6 in evidence, at this time, your Honor?

MR. COOPER: I have no objection.

xx (Plaintiff's Exhibit 6 for identification was received in evidence.)

MR. POWERS: Your Honor has already seen that document?

THE COURT: Correct.

Q You had no contact with either McIntyre or Frank after the board meeting with respect to any of the accounting work done in the Faggen acquisition, did you?

A Which board meeting?

Q Let me rephrase my question.

After the board meeting on October 9th, when the deal was approved, you had no personal contact with any of the accounting work or the accounting details on the transaction, did you?

A No.

Q Did you participate in any discussion of Mr. Faggen's Companies' tax returns during that period, any discussion of tax returns?

A No.

Q Do you recall hearing any discussions either with Mr. Faggen or with Mr. Frank or anyone else on the difference between the tax returns and Exhibit 3?

A I don't recall any.

Q Now, up until the acquisition of the Faggen Companies, would it be fair to say that virtually all of the acquisition work done by the Titan group was real estate property? Would that be a fair statement?

A All except one.

Q And what was the one that wasn't real estate?

A A company called Titan Steel, I think was the name of it.

Q Was that an export shell?

A No. That was an operating company. Steel exporting and importing company.

Q And that's how you got the name Titan.

A Right.

Q Did you do any review of the financial statements on that deal?

A Just very broadly.

Q Now, with respect to Exhibit 3, do you recall testifying previously that Michael Rosen, of your office, never saw Exhibit 3 until just prior to his deposition? Do you recall giving that testimony?

A I think he said it.

Q Yes. Do you recall relating that at your deposition?

A I don't recall that I said it. I think he said it. I may have. I don't remember.

Q Well, let me just refresh you so we can have the record clear. Page 94.

"Q Do you know whether or not your partners Rosen and Aronson had knowledge of the existence of this memo prepared

by Faggen at the time they were working on this deal in November and December 1968?

"Can you answer the question, Ben?

"A I have no knowledge of whether Alan knows. I haven't even discussed it with him. I think Michael Rosen said to me just the other day that he had never seen this before."

Do you remember that?

A Yes.

Q Do you recall, shortly after the Faggen acquisition was closed, getting involved in representing the Faggen Companies in an action against Levin-Townsend? Do you recall that matter?

A I do. I don't remember when, but I remember the matter.

Q Well, I show you the following document purely to refresh your recollection. I don't think there is any need to have it marked. It is a bill from your firm on that.

A Starting December 16th, right.

Q December 16, 1968.

A Right.

Q And could you describe to the Court what the nature of that problem was starting December 16, 1968?

MR. COOPER: I object. I don't think it is

relevant, your Honor.

THE COURT: Perhaps I missed the point, Mr. Powers, but this is this litigation with Levin-Townsend?

MR. POWERS: Right.

THE COURT: Fine. But do we have to go through all of that detail?

MR. POWERS: All right. I'll withdraw it.

THE COURT: There is no dispute about the existence of the litigation.

MR. POWERS: We fixed the date. No problem. Thank you.

THE COURT: Let me find out.

I assume, Mr. Robinson, you didh't have any active role in that litigation, did you?

THE WITNESS: The Levin-Townsend?

THE COURT: Yes.

THE WITNESS: I participated in the settlement discussion subsequently, in which we recovered, I think, a quarter of a million dollars for the company.

THE COURT: Well, there is no dispute about any of this, is there, Mr. Powers?

MR. POWERS: No, sir.

BY MR. POWERS:

Q Mr. Robinson, I take you back to the period of May

1968. Do you recall having Harold Faggen approach you to ask you if you would undertake representing the Furniture Workers' Union?

A Harold Faggen said that he had been asked by the International president of the Furniture Workers, Mr. Pizer, whether we would entertain representing the Furniture Workers Union. Mr. Pizer knew me for a long time through my representation of the Lithographic Printing Union. And I said to Harold I didn't know, I would have to think about it.

Do you want me to continue?

Q Go ahead.

A And subsequently I said I would entertain the subject to my talking to the International officers.

At some point after that, I met with the International officers at their headquarters.

Q Was this in about May of '68?

A Thereabouts. April or May. And they told me that they had been represented for years by a single practitioner who was not well and could not handle their matters, he knew about me, particular knew about my activities with the Local 1 pension fund, and they were having pension fund problems and wanted to know whether we would consider representing their union and, if so, at what cost.

And he is an interesting character and I remember

well his saying to me, "I'm not sure that we can afford you and I don't know that you want to represent us."

Q The initial retainers under discussion were about 40, 45 thousand dollars a year, weren't they?

A My recollection was that it was about 36,000 representing the International, one or two locals and two or three different funds.

Q And those annual fees have gone up to about 40 or 50 thousand dollars now, is that right?

A I don't think so.

Q Do you continue to represent these funds?

A Yes.

Q Did you make any disclosure of undertaking this work in or about May of 1968 to either Mr. Kaufman or Mr. Frank of the board of Titan?

A I disclosed it to Mr. Frank in telling him about my relations with Harold Faggen and how I happened to know Harold Faggen and where our professional services overlapped.

Q You didn't tell it to him specifically, though, did you?

A I told him that we represented -- we were probably representing the Furniture Workers for which Harold did the actuarial work, we represented other funds in which he also did the actuarial work.

Q Mr. Robinson, let me read to you some questions and answers which may refresh your recollection on what you said on this subject previously on page 117 of your deposition:

"Q Did you tell him that Harold Faggen had spoken favorably in connection with your being offered that engagement?

"A I don't know if he did or not.

"Q You didn't say anything on that subject to Tony Frank, did you?

"A No.

"Q And you didn't say anything on that subject to Kaufman.

"A No.

"Q Nor to the board.

"A No.

"Q You didn't say anything orally to anybody in the company, did you?

"A No.

"Q And nothing in writing.

"A No."

Do you remember being asked those questions and giving those answers?

A I do.

Q And those answers were truthful?

A Absolutely.

THE COURT: Anything else?

MR. POWERS: Almost through, your Honor.

Q Your firm was also handling a litigation for Mr. Faggen personally in 1968, wasn't it?

A So I have been told.

Q And the fees in that were several thousand dollars; is that right?

A To the best of my recollection, it was about $3,000.

Q Well, would it refresh your recollection if I told you it was about 5,000, according to testimony at the deposition?

A I could have been. I thought it was closer to three.

Q And were partners in your firm partners with Mr. Faggen in several real estate ventures in '67 and '68, limited partnerships?

A I don't know what date. I know we are. And I think there were one or two prior to that time and some subsequently.

Q Mr. Robinson, one more question. While you were on the board of Titan, do you recall any claim of fraud being

made in connection with the Faggen acquisition by anyone on the board prior to the fall of 1971?

A The fall of '71? I don't think so.

Q You don't recall any discussions among anyone on the board that Mr. Faggen had defrauded th company?

A Well, you will have to help me on the dates, as to when Mr. Frankel became chairman and when he first raised the issue. That's when it first came up. I don't know whether that was late '71 or '72.

MR. POWERS: Nothing further, sir. Thank you very much.

THE COURT: Any questions, Mr. Cooper?

MR. COOPER: Yes, sir.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Robinson, let's begin backwards for a moment, starting with the last series of questions that counsel has asked you.

Are you aware that, in an affidavit submitted in this case, a proposed motion to amend the complaint was inserted -- reading from page 548A, your Honor -- in which it is alleged, "Based on investigations to date, it appears that Faggen caused a substantial benefit to go to Titan's chairman of the board, Benjamin Robinson, in September 1968, at the

time of the acquisition of the Faggen Companies. This secret consideration, consisting of some $50,000 in annual retainer fees to Robinson from a group of Furniture Workers pension funds were apparently not disclosed to Titan by either Faggen or Robinson, Titan's chairman of the board, although received concurrently with the acquisition negotiations in a patent conflict of interest. The corporate minutes do not reflect any such disclosure, there are no memoranda in the files of such disclosure, and negotiator Kaufman was totally surprised at the revelation."

My question is, did you know at any time prior to when the same line of questions was read to you at the deposition that Titan, Mr. Frankel, was accusing you of a conflict of interest at or about the time of this acquisition?

A Did I know when?

Q Did you know prior to your being informed of it at the deposition which you gave in this case, which was taken on October 3, 1973?

A There was a meeting of the board of directors, and I can't say whether it was late '71 or '72, at which Mr. Frankel told the board that he had an opinion letter from counsel in New York advising that the corporation had action, I think he said for rescission, based upon allegations of

fraud or conspiracy involving both me and Mr. Faggen.

Q I show you this letter, and I would ask you if this is the letter that you refer to (handing).

A I remember the name Silverman as the lawyer, and roughly it seems to me that's the letter.

MR. COOPER: I offer it in evidence.

THE COURT: Isn't this already in the record in the stipulated record on appeal?

MR. COOPER: No, your Honor, this is not.

THE COURT: I thought it was. I beg your pardon. All right.

That will be Defendant's Exhibit H.

MR. POWERS: No objection.

xx (Defendant's Exhibit H was received in evidence.)

Q Do you recall the meeting of September 14, 1971, Mr. Robinson, at which time this letter was read to you and the board?

A Yes.

Q Mr. Robinson, can you tell us the circumstances under which the discussion came up regarding this accusation and what transpired at the board meeting on that date?

A My recollection is that Frankel, acting as chairman, stated that he had a draft of the complaint which he

would have to bring in an attempt to force Faggen to make a deal with the corporation, converting Faggen's outstanding debentures into common stock, and it was in connection with that that he read the letter, and I think he read portions of the complaint. But I never saw it.

Q I show you this complaint and I ask you if this is the complaint that was read to you on that date.

A Well, without reading it word-for-word now, I have never seen it before. I see enough paragraphs to indicate to me that this is what he was reading from.

MR. COOPER: I offer it in evidence, your Honor.

MR. POWERS: No objection.

xx (Defendant's Exhibit I was received in evidence.)

Q Mr. Robinson, are you aware that the interest dates for the Faggen notes occur on May 1st and November 1st of each year?

A I don't remember, but it could be.

Q In any case, are you aware that, notwithstanding this accusation made at the board meeting of September 14th, that the interest payment due on November 1st was, in fact, made, that is, November 1, 1971?

A It was.

Q And this complaint was actually never filed, was it?

A Not so far as I know.

Q At that time, do you recall your statement at the board meeting, "Mr. Robinson vigorously protested against the statements of the complaint and the threat of litigation, claiming that he was being joined as a proposed defendant solely for the purpose of seeking to cause him to put pressure on Mr. Faggen to accept some restructuring of his debentures. Mr. Robinson read certain correspondence which he had written to Mr. Frankel describing his version of the facts of the negotiations and the evaluation of the Faggen Companies at the time they were acquired by the company. A substantial area of dispute centered around whether negotiations leading to the acquisition and the determination of the price to be paid therefor had been conducted by Mr. Robinson or his office or by Mr. Kaufman or his office. Mr. Robinson threatened action against the directors if the complaint were filed joining him as a defendant."

Do you recall that discussion taking place?

A I do.

Q Mr Robinson, did you have anything to do in connection with the negotiation of these contracts?

A I did not.

Q Did you have anything to do in the negotiation of the terms of the transaction?

A I did not.

Q Mr. Powers read a portion of your testimony a little while ago with respect to the disclosure of your previously having represented Mr. Faggen, and he began at page 117. I will now read from page 116, and ask you if you made these answers to these questions:

"Q Did you tell Tony Frank about accepting this engagement as of September 1, '68?"

This was in connection with the union pension fund, Mr. Pizer.

"A Tony Frank knew. I told Tony Frank that my relationship with Harold involved the Lithographer's Union, the Typographical Union and the Furniture Workers' Union, where we crossed.

"Q Did you tell him that you had just taken on the Furniture Workers' Union?

"A I told him that that was a new client."

Do you remember those questions being asked of you and that answer being given?

A I do.

Q All right. Now, Mr. Robinson, dealing with the meeting of October 9th, I believe you testified that when Mr. Frank reported to the board on the potential of acquisition, that he discussed earnings of over a half million dollars.

Do you recall that testimony a short while ago?

A Yes.

Q Did Mr. Frank report to the company that these were earnings on an adjusted basis?

A I don't remember whether he used those words or not.

Q Did he use any words to suggest that the earnings were restated earnings?

A Yes.

Q Do you recall what he said in that connection?

A That there would be normal adjustments, or there would be adjustments which are normally made translating the operations of a private company into that of a public company.

Q And do you recall Mr. Powers asked you whether you relied on this Exhibit 3, I believe, which is the memorandum, the pro forma of adjusted earnings? Do you remember that question being asked of you?

A Yes.

Q Did you testify at your deposition, page 51:

"Q What I'm interested in, Mr. Robinson, is whether you had any doubts at the time you read these four adjusted income figures as to the truthfulness and reliability of those figures as provided by Mr. Faggen. Did you have any doubts, for instance, that the Faggen Companies were not

earning $570,000 pretax adjusted to basis which would prevail after acquisition?

"A I assumed the figures were accurate.

"Q You relied on them, didn't you?

"A I relied on them plus the examination by our treasurer."

Did you make that answer to that question?

A I think I did.

Q And was that a truthful answer?

A Yes.

Q Now, with respect to the memorandum, Exhibit 3, the words which appeared, I believe you testified, "Exclude investment income," were in your handwriting.

A I said it looks like my handwriting.

MR. POWERS: Objection, your Honor. That is on 3-A they are in his handwriting. On 3 they are in Tony Frank's handwriting.

MR. COOPER: Okay. That's what I was trying to get at.

Q Did you have a discussion with Mr. Faggen as to whether or not these adjustments include or exclude investment income?

A I have no recollection.

Q Do you know from whom you got that information?

A I don't know whether I got the information or whether I was raising a question. I don't seem to recall that.

Q I see. And if you were raising a question, do you recall whether you asked Mr. Faggen about it or you asked Mr. Frank about it?

A No. I have no recollection of that. You are talking about prior to the October 9th meeting.

Q Yes.

A I don't recall.

Q And certainly there is no question, Mr. Robinson, that the document when handed to you by either Mr. Faggen or Mr. Frank sometime before the October 9th meeting -- there was nothing on that document in Mr. Faggen's handwriting which had those words on it, isn't that so?

A That's right.

Q Did the question come up at the board meeting? Did anybody ask the question as to whether or not this projection, this restatement of earnings include or excluded investment income?

A I don't recall any and my recollection is that there wasn't any detailed discussion of specific figures, that they were talking about earnings in excess of $500,000 and there was a feeling that this was a great acquisition

for many reasons.

Q Can you tell us what those reasons were?

A Yes, some of them. It was the opinion of Tony Frank and Mr. Kaufman, together with Harold Faggen, that there was a great future in data processing, into which the Faggen Companies had recently gone, and Tony Frank, because of his great connections in the savings and loans associations throughout the United States, had certain thoughts on how he could develop substantial data processing business. Also, the Faggen Companies had considerable relations with the major insurance companies and the major buyers of insurance, the Titan Company had an insurance division, and there were thoughts of various ways in which the two could be put together so that two and two made six and not four.

And it was the thought of taking the Faggen Companies, which had been run conservatively as an individual entrepreneur's ownership, and substantially enlarge it and attempt to make it a very large operating division of the Titan companies. And on that basis they talked about taking space and enlarging the computer capacity and bringing in more computer experts and so forth.

And it was therefore the feeling that Mr. Kaufman, for whom they had respect as a negotiator, had negotiated a deal, and whether the bottom line figures were a particular

dollar or something very modestly from that didn't seem to play much part in the discussion.

Q Did the question of the large cash involved in this company, of approximately one million three or securities, come up?

A Yes. The point was made that the company had a substantial amount of assets which were not required in the operation of the business and that the Titan Company could immediately use that money in order to make more money.

Q Do you recall what the cash position of Titan was at or about the time of this acquisition?

A Yes. It was always tight for funds, always felt it could use more funds in developing its assets.

Q And in connection with the contracts themselves, Mr. Robinson, on the night of the acquisition, December 2nd, do you recall an incident in which Mr. McIntyre had pointed out to Mr. Frank that on the balance sheet there was some item for accrued vacation pay?

A I do.

Q Will you tell his Honor what happened that night?

A The closing of this transaction was going on in our large conference room at the end of a long hall. My private office is on the exact other end of the hall. Somebody came into my office, either Tony Frank or McIntyre, and

said they would like to talk to me about something which had just come up, and I remember walking down the hall, going into the small office near the conference room, and the issue of this accrued vacation came up, and to the best of my recollection Tony Frank evidenced some surprise that that was on there and had asked me to join a meeting with him and Harold Faggen to see if that could be taken care of in such a way that -- and as I recall how they disposed of it, I think Harold Faggen took the responsibility for that. That's my recollection of it. But it was disposed of rather quickly and they went back into the conference to close the deal.

Q Prior to the closing of their deal, did the executive committee approve of the contracts and the transactions?

A Yes.

Q Were you on the executive committee?

A I was.

Q At any time at any of these meetings that you participated in, Mr. Robinson, did either Mr. Frank or, in any conversations with Mr. Kaufman, did either of them ever suggest to you that the adjusted earnings figures were not correct?

A No.

Q Do you have any recollection as to whether either

of them had told you that they had checked into the adjusted earnings figures?

A I don't recall.

Q Lastly, Mr. Robinson, we have had introduced into evidence in this case a proxy statement which was issued by Titan in 1969 after Mr. Kaufman had become chairman of the board. For the moment, I don't have it in front of me, but I think I can paraphrase what it said. It said that the financial condition, the business and assets of this company were thoroughly investigated by Titan prior to acquisition and this was an arms length transaction entered into between the parties, with each side separately represented by counsel. Was that a truthful statement, Mr. Robinson, so far as you know?

A Absolutely.

MR. COOPER: No further questions.

THE COURT: Any redirect, Mr. Powers?

MR. POWERS: No, sir.

THE COURT: Before we change our minds, Mr. Robinson, you had better be excused. Thank you.

(Witness excused.)

THE COURT: Messrs. Powers and Cooper, I wish I could give you a precise date to resume, but perhaps before we try to cope with that, if you could come up here and chat

with me briefly, maybe we could figure something out.

(Discussion off the record.)

(An adjournment was taken without date.)

TITAN GROUP, INC.

vs. 72 Civil 1797

HAROLD FAGGEN

March 5, 1974
11 a.m.

(Trial resumed.)

MR. POWERS: My next witness is Mr. Eugene A. Hegy. Would you take the stand, please.

E U G E N E A. H E G Y, JR. called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Hegy, what is your present job?

A I am Vice Chairman of a real estate firm in New York, Brett, Wyckoff, Potter & Hamilton, Inc.

Q How long have you been with them?

A Since April of last year.

Q Mr. Hegy, were you employed by Titan Group, Inc., in 1968?

A Yes, I was.

Q How long were you employed with Titan Group?

A I joined them in September of 1962 and stayed with them until the end of May in 1969.

Q What office did you hold in the corporation?

A Initially, Executive Vice President for a short term in the end of '65 until, for about 9 months, I was the interim President of what was then Titan--the name was slightly different, it was Titan--not Industrial, but Titan--

Q Were you a director of Titan Group?

A From 19--late '65 until '69, I was a director. I was Sr. Vice President at the time you are talking about, and President of the real estate subsidiary.

Q When you say at the time I'm talking about, is that in the fall of 1968?

A 1968, the entire year.

Q Did you know Harold Faggen in 1968?

A Yes, I did.

Q In what connection did you know Harold Faggen?

A I met Harold Faggen early at one of the stockholders' meetings, and we used to see Harold occasionally at stockholders' meeting.

Q He was a Titan stockholder?

A He was.

Q Did you acquire any knowledge of the negotiations for the acquisition of the Faggen Companies before October of 1968? I'm interested in the period before October of '68.

A We had several meetings with Ben Robinson, who was then Chairman of the Board, and Dick McIntyre, who was our

treasurer, in which they discussed the negotiations which were being carried on between them and Tony Frank, and Harold Faggen.

Q Did you acquire knowledge of any specific factual information on the finances or performance record of the Faggen Companies before October of 1968?

A Not much. We were just told that this was one of the negotiations which were pending.

Q I show you a document which has been marked Exhibit 3 in evidence and ask you, sir, if you have ever seen that document before.

A Yes, I have.

Q When did you see it before? When did you see it for the first time?

A Well, I went on vacation in 1968, the latter--the last week in September and the first two weeks in October. I think I came back around the 13th or 14th of October. I had known that there were negotiations pending, though I didn't know too much about it, as I said. But when I got back, because I had missed the Board of Directors' meeting at which the matter had been brought to the Board, both Dick McIntyre and Ben Robinson filled me in on what had happened. They showed me the details, the memorandum, which had been prepared, and discussed the deal generally, as they did all the other

things which had happened at the meeting.

Q Did they give you a copy of that memorandum to read?

A No, sir, I don't believe they did. To read, yes, to look at. But I didn't--

Q Did you keep a copy?

A I didn't get a copy, no.

Q Did you read it when it was shown to you?

A Yes, I did.

Q Did you read the financial portion of it, Exhibit A, which is the 4th page of Exhibit 3?

A Well, that was--yes, I did.

Q And did you ask any questions about the financial portion of it?

MR. COOPER: I'm going to object to any conversations not in the presence of the defendant, your Honor.

THE COURT: Yes, and beyond that, Mr. Powers, I don't quite understand the relevance of this.

MR. POWERS: Well, if I can proceed, I think I can show the relevance of it, your Honor.

THE COURT: In any event, I think I agree with Mr. Cooper. There's no sense getting into internal conversations, particularly of an informant nature.

Q Back in 1968, were there any procedures in Titan for Board review of potential acquisitions or other major

transactions?

A When you say "procedures", we have discussed the things. Again, we had the operating people who normally, although they worked in their own divisional areas, were kept abreast of what was going on. The main purpose was that if we had any discussion or objection, Ben felt that we should bring it up among ourselves rather than have our arguments at the Board when we had our non-management members present.

Q Was this memo shown to you in connection with your status as a board member?

MR. COOPER: I'm going to object to that as leading and suggestive, your Honor.

THE COURT: Certainly in the present form, it is. But let me go back a minute because this whole line puzzles me. Mr. Hegy, I gather you got back from vacation in late October and then, as I understand it, some man named Robertson or Robinson--

THE WITNESS: Robinson, sir, Benjamin M.

THE COURT: Robinson. I thought you mentioned a Dick Robinson.

THE WITNESS: Richard McIntyre.

THE COURT: Aha. One of those men gave you this document which we call here in this trial Plaintiff's 3, is that so?

THE WITNESS: They showed me--

THE COURT: They showed it to you?

THE WITNESS: Yes, sir.

THE COURT: And you, at least, skimmed it if not read it?

THE WITNESS: That's right.

THE COURT: All right. Now, what's your question, really, Mr. Powers?

Q What was the purpose, if you know, of Mr. Robinson or Mr. McIntyre giving you that document to read?

MR. COOPER: Objected to, your Honor.

THE COURT: Yes, I don't understand how he could possibly answer such a thing.

Q Mr. Hegy, were you asked to consent to the Faggen acquisition?

MR. COOPER: Objected to, if your Honor pleases.

Q As a director?

THE COURT: Well, I think I will allow this. In other words, Mr. Hegy, were you called upon in any way to state your position formally as a board member in respect to this acquisition of the Faggen Companies?

MR. COOPER: Your Honor, I just want to point out that the witness has testified that he was not at the board meeting.

THE COURT: I understand. I understand that but I'm going to allow this to see what happened.

THE WITNESS: Yes. First I was simply shown everything that I--I got the minutes of the meeting and what was discussed at the meeting was discussed. And I was given an opportunity to pass on the deal, as I say, like any board member. And I did, of course, approve it.

THE COURT: You did?

THE WITNESS: Yes, sir.

THE COURT: Now, who was it who asked you to express yourself, Mr. Robinson?

THE WITNESS: Mr. Robinson, yes, sir.

THE COURT: Who was then, as you pointed out, Chairman of the Board?

THE WITNESS: Yes, sir.

THE COURT: All right.

Q Mr. Hegy, when you read this document, were you given any oral explanation of the financial material in the document?

MR. COOPER: Objected to.

THE COURT: I will allow a yes or no answer.

A Yes, I was given a quick rundown of the deal.

THE COURT: By whom?

THE WITNESS: By Ben Robinson and by Dick McIntyre.

both.

Q Can you describe what the rundown of the deal was that was given to you?

MR. COOPER: Objected to.

THE COURT: I quite agree. I think this is an internal matter--

MR. POWERS: It goes to the issue of reliance, your Honor, his understanding of the deal at the time he approved it.

THE COURT: So you say, but that deals with the point I am concerned with and, obviously, the point that defense counsel is concerned with.

MR. POWERS: I think there has been a good deal of testimony permitted, your Honor, as to what transpired at the board meeting without Mr. Faggen being present--

THE COURT: Fine. I'm only interested and concerned with the present objection to this specific problem. Thank you, but I agree with the defendant.

Q Now, Mr. Hegy, did you acquire any information other-- strike that.

Did you acquire any information on the Faggen Companies that contradicted or changed the information that was in this memo you read?

MR. COOPER: Objected to, your Honor.

THE COURT: I must say, do you mean by this after--

MR. POWERS: He read the memo.

THE COURT: Mr. Powers, you bewilder me. It seems to me that this is not only running into the hearsay rule, but, worse than that, I don't see its relevancy.

Q Mr. Hegy, did there come a time when you had a personal conversation with Harold Faggen about his companies in or about--

A In what regard?

Q With respect to the acquisition of his companies, the nature of his business?

A No, I don't recall.

Q Did there come a time when you visited the premises of the Faggen Companies?

A Yes.

Q Can you fix a date for that?

A I guess it was around--it was either late November or December when I went down just to pay a visit.

Q When you paid that visit, did you talk to Harold Faggen?

A He was kind enough to give me a tour of the premises.

Q Did you discuss his earnings?

MR. COOPER: I'm going to object to leading, your Honor.

A No.

THE COURT: First of all, I think that you don't have to lead a witness like this, Mr. Powers, and second of all, I don't know why you would want to.

Q Mr. Hegy, would you tell us what Mr. Faggen said and what you said, the substance of it, as best you can recall, at this meeting at his premises?

A Well, the purpose of the meeting was again, we were two--ran two divisions of a company or were working together. We had a large real estate operation. I was extremely interested in his ability to use his computers for our real estate. Harold told me he was not programmed for it, and this was--he gave me a tour of the premises, we talked about the additional space which he planned to take and the additional computer capacity which he wanted to get.

Q Did you talk about anything else at the meeting?

A No. I met some of his people, and I think I had Gene Gichenberg with me, one of our officers.

Q Did you discuss this memo with Harold Faggen?

A No, sir, I didn't.

Q Did Mr. Faggen tell you anything about his business different from what you had read in the memo?

A No, sir.

MR. COOPER: I object to the form, your Honor.

THE COURT: The answer is no, and I will allow it to stand.

MR. POWERS: Nothing further of this witness, your Honor. Thank you.

THE COURT: Mr. Hegy, I'm curious about really more on a personal level than any other, but what is your educational background?

THE WITNESS: Well sir, I have high school. I went to City College, and it was interrupted by World War II.

THE COURT: Were you in the field artillery?

THE WITNESS: Yes, sir.

THE COURT: I thought so.

THE WITNESS: And you look awfully familiar, sir.

THE COURT: Yes, Fort Sill, Oklahoma.

THE WITNESS: Yes, sir, and you were my Tank Officer, I believe, sir, weren't you?

THE COURT: I wish I could say I was. I was a scruffy dog soldier, just like you.

THE WITNESS: O.C.S. '64? That was my class.

THE COURT: Yes. In the winter of '42-'43.

THE WITNESS: Yes, sir.

THE COURT: Aha.

THE WITNESS: When I came in the court, your Honor, you looked awfully familiar.

THE COURT: Well, I have considerably less hair now. So you have a keen mind.

Mr. Cooper.

CROSS EXAMINATION

BY MR. COOPER:

Q Just one question.

Mr. Hegy, I don't want to challenge your recollection of anything in view of your recollection of events in '42 and '43 now, but I would like to ask you, Mr. Hegy, you said that you had read the minutes of the meeting of October 9, 1968, sometime after you got back, do you recall that?

A Yes, sir.

Q In reading those minutes, did you observe that there was no discussion in there with respect to any financial information of the Faggen Companies?

A Yes, sir, the minutes were--simply showed that it had been introduced and some conversation, but they were brief.

Q In other words, that the company was discussed but there was no discussion at all in the minutes of any financial information on this company?

A I don't recall.

MR. POWERS: Objection, the minutes speak for themselves, your Honor, they're in evidence.

A I don't recall.

Q Have you had occasion to read the minutes just before testifying today?

A No, I haven't.

MR. COOPER: That is all. Thank you.

THE COURT: Thank you, Mr. Hegy. You may be excused, sir.

THE WITNESS: Thank you.

(Witness excused.)

MR. POWERS: Your Honor, Mr. Frankel tells me he was at Fort Sill at the same time, too. And, unfortunately, I was there in 1956.

THE COURT: You were not a member of the O.C.S. Class of '64, I gather.

MR. POWERS: No.

THE COURT: A great place.

MR. POWERS: The next witness is Mr. Alfred Frager.

A L F R E D F R A G E R, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Frager, what do you do for a living, sir?

A I'm the president of a corporation, the name of which is A. M. Frager and Company, central office in St. Louis.

Q St. Louis, Missouri?

A St. Louis, Missouri.

Q Were you connected with Titan Group back in '68?

A Yes, sir, I was.

Q Would you tell the Court what office you held and for what period in Titan Group, please?

A I was one of the official founders of the corporation. I became a member of the board in 1961, perhaps '62, and I served on the board until 1971.

Q Did you hold any office in the corporation other than being a member of the board?

A During an interim period, there was a proposed change of officers, I served as the chief executive officer and that period was 1969 or 1970, I don't remember the exact year now. About that time.

Q Now, Mr. Frager, I take you back to 1968. When did you first hear about the proposed acquisition of the Faggen Companies by Titan?

A The proposed Faggen acquisition was presented to the board in its meeting in October 1968. The pending acquisition or considered acquisition was presented by Tony Frank, who was then the president of the corporation and, in the board room, Tony Frank, who was accustomed not to sit at the table when he made a presentation, walked back and forth and in his hand he had a sheet of paper.

MR. COOPER: If your Honor pleases, I think the witness is not responsive. The question was, when did he first--

THE WITNESS: What's that, sir?

THE COURT: I will disregard all after--you heard about this at the board meeting in October of 1968, correct, Mr. Frager?

THE WITNESS: That is correct.

Q What I am trying to establish, was this the first time you heard any facts on the acquisition?

A That is right.

Q The board meeting was the first time?

A That is right.

Q Tell us, as best you can recall, everything that was said at the board meeting on the subject of the Faggen acquisition, everything everybody there said, as best you can recall.

MR. COOPER: If your Honor pleases, I object to that on the ground that the defendant was not present.

THE COURT: Well, that may be so, but I'm not going to take quite that limited a view so far as the board meeting itself is concerned. However, Mr. Powers, this is a little bit general, and I would think so even from your point of view. We know from Mr. Frager that Frank presented the matter and I will

allow whatever Frank may have said because we have heard from Frank on this subject, and also I think it's permissible so as to get what other information, generically, at least, that was brought to the attention of the board. But I don't want to get into every conversation of everybody there. That's ridiculous.

MR. POWERS: I follow you, Judge.

Q What did Mr. Frank say at the board meeting about the Faggen acquisition?

A He said that under consideration was the following, and he presented this potential acquisition in this manner:

He had a sheet of paper in front of him in which he quoted the results of operation for the year 1968. With the fiscal closing about mid-year with the figures that were presented. And he also presented figures of the three years preceding. This is the manner in which it was presented, that here was an opportunity to acquire a company, and actuarial and computer activity that billed for its services in the area of $1,100,000, the result of which was a net profit before taxes in excess of 50% of those billings in the neighborhood of $550,000. That there was a great probability in the projection that this business could expect after a year's time of making an additional $75- to $100,000, which was a pattern of about a 15% gross, and for the figures of the

preceding 3 years, that the figures average somewhere in the area of just a little below a half million dollars a year. That was the three preceding years of '68.

In addition to which the corporation had total assets in the area of $1.5 million, of which marketable securities totaled somewhere around $1 million. That's exactly the way it was presented.

MR. COOPER: I move to strike the latter part, your Honor.

THE COURT: I see your point, and I will disregard that even without your making the point.

Q Did you make any comment or ask any questions--strike that.

Did you ask any questions about the Faggen Companies at the meeting?

A I remember the comment that any activity that could do gross billings in an area of $1.1 million and come up with such a generous pre-tax profit of $550,000, in that area, that I would like very much to have a piece of that. It was a splendid result, splendid activity.

Q Did Frank make any statements about the customers of the Faggen Companies?

MR. COOPER: Object to leading, if your Honor pleases.

THE COURT: Yes.

MR. POWERS: Let me rephrase that.

Q Was there any discussion on any subject other than the financial results of the Faggen Companies?

A Yes. That's right. Nothing was discussed on the nature except the figures.

Q Was there any observation made by Ben Robinson at the meeting that you recall?

A I think Ben Robinson's comment was simply that the figures presented were attractive, they were reliable and in his mind it was a good acquisition. Incidentally, I voted for the acquisition based on those facts. I thought it was splendid.

Q I show you Exhibit 3 for identification. Was that handed out at the board meeting?

A No, sir, they were not.

Q Was there any mention at the board meeting of Ben Robinson's prior relationship with Mr. Faggen, if any?

A Nothing other than the fact that I recall very favorable comment that Mr. Robinson made about Mr. Faggen, that he had known him, he was a fine individual and this would be a good acquisition.

Q Did you have any conversations with Harold Faggen at or about the time of that board meeting?

A I visited with him after the conclusion of that

meeting because he was elected to the board at that meeting. Welcomed him to the organization, wished him well and just exchanged cordial greetings with him.

Q Was there discussion of his being elected to the board at the meeting where his acquisition was being considered?

A Yes, I think it was mentioned.

Q If I showed you the board minutes of October 9, 1969, and ask you to look at them, is there any reference in there to his being elected at that meeting?

MR. COOPER: If your Honor please, I'm going to object to this.

THE COURT: I'm not quite sure I understand the objection. On the other hand, I must say to you, Mr. Powers, I don't see what the importance of this is. The record will show when Faggen was elected. Why do we badger Mr. --

MR. POWERS: Mr. Faggen was elected at the next meeting after the deal was closed.

THE COURT: All right. If you want him to refresh his recollection or change his answer if he is required to, why, go ahead.

MR. POWERS: I have the minutes of the meeting where he was elected.

THE COURT: Yes, please, let's not quibble about minor details. Do you want to look at that, Mr. Frager?

MR. COOPER: Your Honor, can I just make the observation that I'm sure Mr. Powers will welcome, and that is he referred to these minutes of 1969, I'm sure he meant '68.

MR. POWERS: Excuse me, your Honor, I remember distinctly that at that meeting it was expressly mentioned, the fact that he would be elected to the board of directors.

THE COURT: That's the October meeting?

THE WITNESS: Yes, sir.

THE COURT: All right. Fair enough.

THE WITNESS: He was elected at the next meeting.

THE COURT: Very good. Anything else, Mr. Powers?

MR. POWERS: No, sir, thank you.

THE COURT: Mr. Cooper.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Frager, you're from St. Louis, are you not?

A Yes, sir.

Q I'm sure you knew Mr. Powers prior to his involvement in this litigation, didn't you?

A I didn't, sir.

Q Did you know that Mr. Powers was from St. Louis?

A I have since learned that he is from St. Louis.

Q Okay, Mr. Frager, at the board meeting I think you said that, first, Mr. Frank had said something about the re-

sults of operations for fiscal 1968 showed earnings, and I don't recall what you said. I didn't quite understand your answer. Did you say that he said that there was a net profit before taxes of a half million dollars or $550,000, or what did he say?

A I said specifically that he said that the billings for services totaled in the area of $1,100,000. As for operating income. And the basis of that operating income produced a net profit before taxes in the area of $550,000, which was roughly 50% of his billing. That's exactly what he said.

Q Did he tell you that that result was on an adjusted basis?

A There was not too much said about the figures except to say this: That the Faggen operation was in part an individual operation and that as a consequence of adjustments these would be the figures as a carpet operation.

Q So that there was a statement by him that the earnings before taxes were an adjusted figure?

A That's right.

Q Is that right? In other words, he wasn't telling you that these were the numbers on which taxes had been paid, did he?

A These were the numbers translated as a carpet operation in contra- distinction to an operation of an

individual.

Q Well, did he tell you how the adjusted earnings were arrived at?

A There wasn't anything said about adjustments except the fact that they would be reviewed by the executive committee upon the approval of the board of directors for final action. In other words, we acted at that board meeting subject to the final action of the executive committee.

Q Right. In other words, nothing that you had done there was final that day, you wanted further verification of things, didn't you?

MR. POWERS: Objection.

A What I'm saying, my friend, the action of the board was final, subject to the approval of the executive committee. To review the figures, right.

Q Review the figures?

A That's what we did on all acquisitions.

Q As a matter of fact, this was the first acquisition after the Block group came in.

A Let me see. The Block group came in--

Q Let me refresh your recollection. The Block group came in sometime in March of 1968.

A All right.

Q Mr. Frank became president at or about that time?

A That's about right, yes.

Q And was Titan suffering from a liquidity problem during that year?

A Titan had its problems.

Q My question is, was there a liquidity problem?

A Well, there wasn't a liquidity problem except to say this: From its inception, it was always fighting for a cash position.

Q All right. You knew when this was discussed that there was approximately $1.3 million in securities that you were going to get ahold of with the Faggen acquisition?

A I don't remember a $1.3 million for the securities, but I remember, and I sat next to Harold many times at meetings, and I think in my memory that the securities were just in excess of a million, $1.1 million.

Q But if they were $1.3 million, you wouldn't quarrel with that figure?

MR. POWERS: I object to that question. He's just arguing with the witness's answer.

A My recollection is simply this: That the total assets we were going to acquire were in the area of $1.5 million. In exercising my judgment whether we should accept it or not, vote for it or against it, the figures I remember, and I remember it vividly because I repeated to a number of my asso-

ciates in casual conversation without mentioning names that here was an opportunity that we acquired that was simply great on its presentation and $1.1 million is what I remember.

Q All right. Let's leave it at $1.1 million. In any case, you knew that you had $1.1 million that was not required for the operation of the actuarial position that Titan would be able to get ahold of.

A I knew they had marketable securities of $1.1 million.

Q That was an important asset for Titan to acquire, wasn't it?

A It was important to the extent that any acquisition of assets are important. It had no special significance.

Q Mr. Frager, in view of the fact that this was the first acquisition after the Block group came in, do you recall--I'm just trying to jog your memory now--do you recall whether or not you were told at the board meeting that Ed Kaufman was the negotiator for Titan?

A Oh, I knew he was the negotiator.

Q You did?

A Yes.

Q Did you know Ed Kaufman?

A I first met Ed Kaufman when he came in as a representative of the Block group. I didn't know him before that.

Q He wasn't at the board meeting, was he, of October?

A He was elected to our board not too long after the Block acquisition.

Q Would that be prior to this meeting of October?

MR. POWERS: If you want to show the witness--

MR. COOPER: Just a moment, Mr. Power, why don't you let me conduct my examination.

A You're taxing me for a specific date.

Q Not really a day. I'm trying to get you down to a month or a particular time.

MR. POWERS: Your Honor, if the witness has indicated a lack of recollection, both sets of minutes are in evidence here.

THE COURT: Mr. Powers, that's not the point of the inquiry. This is cross examination. Understand that.

A Well, you want me to hazard a guess?

Q No, I want you to tell us what your best recollection is.

A There were so many meetings that in all truthfulness, I can't say definitely whether he was or was not present at that meeting.

Q All right. Was he--do you recall whether he was at any meeting prior to that meeting? Was he on the board, would you recall?

A He was elected to the board subsequent to our--to

the Block acquisition of the Futterman interest and that could have been in the spring or summer of '68.

Q That's your recollection of when he went on the board?

MR. POWERS: Objection, again he is misstating what the witness said. The witness said there could have been and he obviously doesn't recall, and the minutes are the best evidence.

THE COURT: Mr. Powers, would you please not worry so much about these matters and not put words in anybody else's mouth? If you want to object, object. And then I will rule, but these constant running commentaries of yours are not helpful to your cause.

MR. POWERS: Excuse me, your Honor, please note my objection.

THE COURT: We will let that matter go.

Anything else, Mr. Cooper?

A Just a minute, I'll give you an exact answer. I'll look at my memo. I have some memos here. I made some memos before I left home.

The chairman of the board in 1968 was Ben Robinson, president of the corporation at that time was Tony Frank, members of the board were Sam Bergman, Leonard Casey, Harold Faggen, Rocky Gasco, Curt Grunebaum, Gene Hegy, Ed Kaufman,

Dick McIntyre, Jim Russell, John Spence, and Ben Weinstein.

Q May I see that piece of paper, please?

A Surely. You will pardon my careless typing. You are welcome to that.

Q Mr. Frager, would it help you any if I were to tell you that Mr. Kaufman was not elected to the board until December of 1968?

A All right.

Q He was not elected in the summer or the spring; does that refresh your recollection?

A No.

Q Well, the reason for my asking you the question earlier was, I had asked you whether you had met Mr. Kaufman prior to the board meeting at which this acquisition was approved.

A I didn't know the gentleman.

Q You didn't know him. But you knew that he was the negotiator for Titan?

A Yes, I did.

Q And the Faggen acquisition?

A He was a representative of the Block group, as was Ben Weinstein, two men, John Spence was a third.

Q Tony Frank, as well?

A Tony Frank, as well, right.

Q Did you know that the Block group had analyzed this acquisition among themselves prior to bringing it to the board?

A I had no knowledge of that.

Q No. With respect to the statements made by Tony Frank at the meeting, getting back to that for a moment, Mr. Frager, did you subsequently learn that the reported earnings of the Faggen Companies for the year 1968, the fiscal year '68, which essentially ended in June of '68, all of it, that the reported earnings for these companies, for those years, was about $365,000?

A There--did I subsequently learn that?

Q You weren't told that at the board meeting?

A No, sir, absolutely not.

Q So what I'm asking is, did you learn it at any time after the board meeting?

A Yes.

Q When did you learn it for the first time?

A It was in New York, and I had paid a visit to my friend, Harold Faggen.

Q When was that?

A I came in to congratulate both Harold and his wife, Rose, on their marriage, and I would say that was in the middle of '72, perhaps, fall of '72. Right around that area. It was a very cordial visit and Harold told me at that time

of his difficulties and he had a very unhappy health experience and he told me about problems with a corporation, and he explained to me then, outlined it rather specifically, that he had a tax base on his personal return to which certain adjustments were added to create the other figures. He told me that.

Q All right. But you didn't know that before?

A I had no knowledge of it, no, sir.

Q Mr. Frank never told you that at the board meeting, did he?

A No, sir.

Q In the two years prior--well, the 3-1/2 years prior to this lawsuit, you say you went off the board in 1971?

A In the spring of--in the spring of 1971, that's right, sir.

Q And that was when Mr. Frankel became chairman?

A Let me see. Ben Robinson--

Q Well, let's do it quickly.

A I will look at my records, I will tell you real quickly.

Q Mr. Frager, really, I think we can agree on this. Mr. Frankel became chairman of the board sometime around February or March of '71. I was wondering whether you were still on the board after that.

A In the board meeting that was held in Louisville, Kentucky in the spring of '71, Bob Frankel conducted the meeting. I may have been elected chairman at that particular meeting.

Q Ed Kaufman was chairman through all of 1969, wasn't he?

A That's right.

Q And he was chairman through most of 1972, wasn't he?

A Until the time--

Q I mean 1970.

A 1969, a portion of '70, until Mr. Frankel came in, right. That's when I--wait a minute. When Ed Kaufman was removed, that's when I became the executive--the chief operating officer. I replaced him, right.

Q All right. Let's go back for a moment in that period, Mr. Frager. Going through 1969 and 1970, at any time during that period when Mr. Kaufman was chairman, did you ever hear from him any suggestion that there was anything improper in the acquisition of the Faggen Companies?

A No, sir.

Q Did you know, Mr. Frager, that in April of 1970, Titan had caused to be issued to Mr. Faggen's first wife an estoppel letter, setting forth that the notes issued to Mr. Faggen were good and valid notes; did you know about that?

MR. POWERS: Objection, your Honor.

A All I know--

MR. POWERS: Why don't you wait for his Honor to rule?

THE COURT: I'll allow that, because I believe that letter, the date is appropriate.

MR.POWERS: My objection,sir, is only to the characterization. If he wants to show him the letter and say, did you know this was sent--

THE COURT: That, I think, I might agree with.

MR. POWERS: But I was trying to refrain from explaining my objection, as per your Honor's last admonition.

THE COURT: I think I will accept that.

Do you mind showing it to him?

MR. COOPER: Not at all.

THE WITNESS: May I answer that?

THE COURT: Wait until you see this document.

While we're digging that out, in what business is A. M. Frager and Company?

THE WITNESS: The hosiery business.

THE COURT: Manufacturers or jobbers?

THE WITNESS: Manufacturers and distributors, both.

THE COURT: Both.

Q Mr. Frager, I show you this; it's page111-A and 111-B

of the appendix, your Honor.

A I never saw this before.

Q Did you see the telegram? That's 112-A.

A No, sir.

Q Did you know that it had been issued?

A No, sir.

Q You didn't know that.

A I know we issued $5.5 million in convertible bonds for the acquisition of the corporation. I can tell you that.

Q That we all agree on. I'm asking you whether you knew about this estoppel letter.

A No, sir, I wasn't privileged with that letter. It was discussed about the board as far as I know.

Q With respect to the period of 1969 and 1970, do you recall a problem arising out of the Yosemite acquisition, Mr. Frager?

A What type of problem?

Q Financial problem.

A The corporation had lots of problems. It's just one of several.

Q Let me tell you what I'm getting at, Mr. Frager, it might help you expedite your answer. First of all, did you know as a result of the Yosemite acquisition that the company was prepared to write off approximately $2,600,000 of losses

in 1970.

A For the Yosemite operation?

Q Yes.

A My answer to that question is the Yosemite operation was a little more costly to develop than we anticipated. The amount of any losses, I'm not familiar with.

Q Did you know it was Kaufman who brought that transaction to Titan?

MR. POWERS: Objection to the relevancy of this, and I don't even see where it fits in cross examination.

THE COURT: I'm sorry, I don't quite agree. I will allow this.

A There was another individual's name who I can't recall at the moment.

Q Gunther?

A Gunther. He appeared before the board meeting with this potential offering, acquisition; that's right, Gunther.

Q Was Kaufman involved with Gunther?

A I didn't know that.

Q You didn't know that at the time?

A I don't know it today.

Q Did you find out at any time that Mr. Frankel, after he became chairman, leveled charges against Mr. Kaufman for conflict of interest and breach of his duty to the corporation

by reason of that transaction?

MR. POWERS: Objection, your Honor. It's a characterization. Again, I think the question could be asked in a simple, straight-forward way without giving a legal brief in the question.

THE COURT: I'm sorry, that's a fair enough statement of the problem. Go ahead.

THE WITNESS: Mr. Cooper, will you please rephrase your question so I will understand it thoroughly.

THE COURT: Do you recall, sir, any episode where Frankel made charges that Kaufman had been guilty of a conflict of interest in connection with either the Yosemite transaction or, indeed, any other transaction?

THE WITNESS: Your Honor, may I ask a question? You are using the name Kaufman, and he used the name Frankel. I'm a little confused at this point.

THE COURT: Frankel making the accusation against Kaufman.

THE WITNESS: He used the name Frank.

THE COURT: Frankel.

THE WITNESS: Brought charges against--

Q Against Ed Kaufman.

A And you're asking whether I knew about that?

Q Yes.

A No, sir.

Q You didn't know that?

THE COURT: Did you ever hear of any such thing?

THE WITNESS: I wasn't privy to that discussion. I don't know anything about that. It was an internal matter. They didn't discuss it with the board.

Q Well, now, you don't know whether it became a board matter, do you?

A No, it was not a board matter. Because what you're telling me now I'm not familiar with.

Q You went off the board in March of '71? What was the date you left the board?

A The record was in the middle of April 1971.

Q That was when you left the board?

A Yes.

Q Did you resign?

A I didn't resign. There was a different composition of the board, and I wasn't elected to the board.

Q I see. Mr. Frager, while you were there, do you recall that Mr. Kaufman, as chairman, had called upon Mr. Faggen in the operation of his division to submit or to pay in large sums of cash for the operation of Titan?

A You said while I was there? When is this?

Q While you were a director, between '69 and '71.

A During my term as a director, the question is what?

Q Whether you were aware of the fact that Mr. Kaufman as chairman had asked Mr. Faggen, in the operation of his divisions, to turn over cash to Titan?

A I think that request was made of several of our acquisitions.

Q I know. And did Faggen turn over substantial amounts of cash, that you know?

A I don't know the exact figures, but I do know we drew money from each of our subsidiaries for central carpet usage, right.

Q Did you know that Mr. Frankel, as head of Sovereign, had refused to pay any cash into Titan in the year 1970?

A I don't know that answer, but I do know that monies came from Sovereign Construction, sizable money.

Q Did that occur prior to his being chairman of the board?

A You're pinning me down to something I can't give a yes or no answer to.

Q What I'm getting at, Mr. Frager, you operated as the chief executive officer of the company for a short period of time, didn't you?

A Yes, sir. You are asking what happened when I was chairman.

Q No, I encompass the entire period. You being chairman after Kaufman went out, right?

A I was the chief--no, I didn't become chairman. I was the chief operating officer, not the chairman of the board.

Q You became chief operating officer after Kaufman left?

A Yes, sir.

Q And he left sometime in the summer of 1970 as chairman?

A That's approximately correct.

Q Okay. Now, then, between the summer of 1970 and February of March of '71, when Mr. Frankel became chairman, you were the chief operating officer?

A No, not that time. I was the chief operating officer until the close--towards the close of 1970 and we had a board meeting at that time. I think he was chairman at that time. Or, if he wasn't, maybe Robinson was. I'm not exact about that. But, I was not the chief operating officer in 1971.

Q Do you have any recollection of any payments or refusal to pay by Mr. Frankel on behalf of Sovereign to Titan in the period 1970?

A Mr. Cooper, I can say that there was hesitancy on the part of several to pay out funds unless they could spare it. But I repeat that the records will reveal that there was

money that came in from each of the subsidiaries during the term that I was the chief executive officer because we needed the funds at the time.

Q It wouldn't surprise you if I told you, Mr. Frager, that Mr. Frankel, at a deposition, had testified that he resisted paying any funds over to Titan until he became chairman?

MR. POWERS: Objection to that question, your Honor.

THE COURT: Well, I think it's really in effect been asked and answered because, as I understand Mr. Frager, he has no recollection of this kind of detail.

MR. COOPER: All right.

Q Mr. Frager--

MR. COOPER: I have no further questions.

THE COURT: Any redirect, Mr. Powers?

MR. POWERS: No, sir.

THE COURT: Thank you, Mr. Frager. You may be excused, sir.

(Witness excused.)

MR. POWERS: Your Honor, I miscalculated the length of these two witnesses, and I don't have another one until after the luncheon break.

THE COURT: Mr. Powers, forgive my amusement, but we are jinxed, aren't we? Now, you gave Mr. Burton Cooper and

the Court a long list of witnesses, and as I recall and count up, if you are still sticking to that list, we've got six more to be heard from. You gave us a list of eight.

MR. POWERS: Roughly, I think I can do five or six a day. There's two additional witnesses that have appeared that I am going to use, but I anticipate completing with about four witnesses. I will have two witnesses on this afternoon that I will complete with, and I anticipate four or five witnesses for tomorrow, and I ought to complete the day after. That's what I'm planning.

THE COURT: As you know, we're struggling hard. Mr. Cooper has foregone a trip which he wanted to take in an effort to expedite this, and it's sort of sad.

Do you have some--I can't assume you have anybody you would like to put on to fill in the gap, do you, Mr. Cooper?

MR. COOPER: Not at the moment, your Honor. I want to hear his whole case.

THE COURT: Well, I can't blame you for that.

MR. POWERS: What threw me off, your Honor, was when you said you were starting at 11. I took my morning witness and pushed it into the afternoon.

THE COURT: Well, I can understand, but we'll lose a half-hour, I guess.

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Could you use this interval, however, to maybe have quite a few witnesses available? There's no reason why any of these should run very long, that I can see. Except possibly Russo and Herbert Williams, and even they, I shouldn't think, would be very long.

MR. POWERS: Well, I have them lined up, your Honor, and I have everybody on short notice, and I will bring them in very quickly.

THE COURT: Let's do this: We will resume at 1:30.

MR. POWERS: Fine. I will have my 2:00 o'clock witness and have him here earlier.

MR. COOPER: Excuse me, your Honor, before we recess, there may be some things, part of the debris of this case, that we can clear up before we go.

I had asked Mr. Powers for a concession with respect to an Exhibit B. I have subpoenaed the records of Peat, Marwick, and the records were delivered to my office by Peat, Marwick with the understanding that if I needed somebody to identify and to testify that these records were their records prepared for them, that they would be here today. Now, perhaps we can get a concession on that now and avoid the production of Exhibit B.

THE COURT: I would hope you could. Do you want somebody to come in and authenticate this from Peat?

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MR. POWERS: No, sir. The problem is that he gave us a form which is different from the schedule of marketable securities that's in evidence already, which I obtained from our internal accounting people's records at the time, and until I can discuss this form with our internal accounting records people, I don't know whether this is valid or where it came from, and so forth. I will be glad to stipulate it into evidence as soon as I can get the background and I will have it by tomorrow.

THE COURT: Well, would that accomodate your purpose?

MR. COOPER: Well, if by tomorrow we can have it, I don't know if I will need it to cross examination any witnesses today.

THE COURT: Well, you can always use it to cross examine without the aid of bringing anybody in from Peat, Marwick.

MR. COOPER: Your Honor, your Honor may recall that prior to our recess the last time, I had given counsel Exhibit B, which has now been produced by Peat, Marwick. It's identical with that.

THE COURT: I understand.

MR. COOPER: I asked them in that week to please verify it so we can get it.

THE COURT: I recall that, too, but here's Mr. Powers

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saying he has to consult some internal accountant. But, in any event, since you are not going to have to present any proof of a direct nature today, I see no harm in waiting until tomorrow. He promises his answer tomorrow. Please, I hope you mean it, Mr. Powers.

MR. POWERS: Oh, yes, I will speak to Williams tonight.

THE COURT: Fair enough. And I was also observing the objections, Mr. Cooper, just because nobody's authenticated this in a direct sense doesn't mean you can't use it on the cross; you certainly can, as I understand our splendid rules of evidence.

MR. COOPER: Thank you, Judge.

THE COURT: All right. 1:30.

(Luncheon recess.)

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AFTERNOON SESSION

1:30 P.M.

THE COURT: I apologize, gentlemen. Unfortunately, meetings of lawyers and/or judges always tend to run over.

Now, Mr. Powers.

MR. POWERS: My next witness is Mr. Michael Rosen.

Would you take the stand, please, Mr. Rosen.

M I C H A E L N. R O S E N, called as a witness by the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Rosen, would you state your profession, please?

A I'm an attorney.

Q What firm are you associated with?

A I'm a partner in the firm of Robinson, Silverman, Pearce, Aronsohn & Berman.

Q In 1968, were you a partner of that firm?

A No, I was not. I was associated with the firm.

Q How old were you in 1968?

A I was 27, 28.

Q About three years out of school?

A That is correct.

Q Did you work on the acquisition of the Faggen Companies?

A Yes, I did.

Q When did you commence your work on that acquisition?

A In the latter part of October '68.

Q Who was in charge of the legal work on that acquisition for your office?

A I handled the acquisition along with Alan Aronsohn in our office, and Ed Kaufman out on the West Coast.

Q Was Alan Aronsohn a specialist in acquisitions in '68 or a specialist in tax law?

A He has expertise in both areas.

Q Would it be fair to say that you carried the laboring oar on the acquisition for your office in terms of the legal work?

A I did most of the legwork, yes.

Q And you did the redrafting and modifications of the contracts and the exhibits and the supporting documents?

A That is correct, subject to review.

Q Right. And no one else helped you, other than Mr. Aronsohn, is that right?

A And Ed Kaufman, yes, that is correct.

Q Right.

Was the first contact you had with the Faggen deal a conversation in your office?

A Yes.

Q Who was that with?

A It's hard for me to recollect. It was either with Ben Robinson or Alan Aronsohn, or both of them.

Q Do you recall what your assignment was?

A I was told that Titan and Harold Faggen had had a meeting of the minds as to a transaction, and that the firm of Irell & Manella, with which Ed Kaufman was associated, would be preparing the first draft and sending it to us, and then I would be assigned to the matter.

Q At that time, your office had represented Mr. Faggen as his counsellors in the past, hadn't they?

A I believe that is correct, but I did not. I had no relation with them.

Q Your office had handled a litigation involving a company called Mooney Aircraft at or prior to that time for Mr. Faggen, hadn't they?

MR. COOPER: I'm going to object to any of that, your Honor.

THE COURT: I don't quite understand the import of this from your point of view, Mr. Powers.

MR. POWERS: Your Honor, I feel--

THE COURT: Do you want to develop that the Robinson firm had done some work for Faggen before?

MR. POWERS: Right.

THE COURT: If you think this is so important, why,

I will allow it subject to this point, however. I'm not at all convinced that this is anywhere near being relevant to your claims in this case.

MR. POWERS: Thank you, sir.

THE COURT: I will take it subject to that so we can move on. But let's not go into all the gory details.

MR. POWERS: I understand.

Q Do you remember the question,Mr. Rosen?

A Yes. I know that there was that matter in the office but I was not personally involved in it.

Q Mr. Rosen, at that time, did Mr. Faggen have a lawyer who was representing him in the transaction? When I say "at that time", I mean when you were first assigned to the matter.

A Your time frame is now at about the time that I received the papers from Kaufman's office?

Q At or before that, yes.

A Yes, I was informed at that same meeting that Mr. Faggen was represented by a lawyer named Simon Sheib.

Q And your office had recommended Simon Sheib to Mr. Faggen, hadn't they?

A I have seen that in some of the papers, and I have heard that subsequently, but I was not aware of that at the time.

Q But you knew Simon Sheib from previously, didn't you?

A I had worked on a previous transaction in which he was opposing counsel.

Q The first step that you took in the transaction was to receive a first draft contract from Ed Kaufman, wasn't it?

A That is correct.

Q And then you sent a copy of that first draft contract to Simon Sheib, is that right?

A That is correct.

Q Was the next thing you did to hold a meeting with Simon Sheib to discuss the contract?

A I reviewed the contract at the same time that I sent it to Simon Sheib.

Q And then you held a conference with Sheib?

A Sheib, Aronsohn, myself.

Q Was Mr. Faggen present?

A I'm not sure. He might have been, but I'm just not sure.

Q All right.

THE COURT: Excuse me just a moment, if I may intervene. Let me see if I understand you, Mr. Rosen.

You got a first draft from Kaufman?

THE WITNESS: Yes, sir.

THE COURT: And then you turned it over immediately

to Simon Sheib?

THE WITNESS: Yes.

THE COURT: You didn't make any changes at that point?

THE WITNESS: No, I delivered it by hand to him and I said we would review it at the same time he would review it.

THE COURT: I understand.

Q What was the substance of the discussion at the first meeting you had with Simon Sheib to discuss the draft?

A It's very difficult for me to recollect. There were a series of issues which Sheib raised that were of concern to him and his client, and he asked that we address ourselves to those issues.

Q One of the issues was registration covenants for his securities, wasn't it?

A Yes.

Q And one of the other issues was the substance of his employment agreement, wasn't it?

A It's possible. I just don't recall.

Q Do you recall any of the other issues that were the subject of discussion?

MR. COOPER: Your Honor, I don't know what relevancy this has to this contract. I think that there's a merger of all negotiations into the contract documents.

THE COURT: Well, aside from that possible point or points, I can't see what in the world this has to do with the nature of the complaint which Titan is litigating here.

MR. POWERS: I think my next question will make it clear, your Honor.

THE COURT: Well, I hope so because I'm totally puzzled.

Q Mr. Rosen, at th first meeting you had with Simon Sheib, was there any discussion as to the earnings of the Faggen Companies?

MR. COOPER: Objected to, if your Honor please.

THE COURT: I will take this subject to some kind of connection.

Do you recall any such discussion, Mr. Rosen?

THE WITNESS: The only discussion that I recall had to do with the nature of the financial statements. I don't recall that earnings were discussed but that the financial statements of the Companies were discussed.

Q I show you Exhibit 3 for identification, and ask you if you have ever seen that document before.

A Yes, I have seen this before.

Q When was the first time you saw that document?

A My recollection is that the first time I saw this document was when I was preparing to have my deposition taken

in this matter.

Q So that you didn't see this document until on or about the first day of October, 1973, is that right?

A Some time frame in there, yes, sir.

Q Do you recall any discussion as to the substance, the factual matters, contained in this document at any time prior to your first seeing the document, and, in particular, do you recall any discussion back in October of '68?

MR. COOPER: I'm going to object to that, if your Honor please.

THE COURT: Well, since I missed the thrust of this, I gather what you want to know is, looking at this now, does this refresh him as to anything that was discussed about what you term issues at this first meeting between Aronsohn, Rosen for Titan, and Sheib for Harold Faggen?

MR. POWERS: Yes, sir, exactly.

THE COURT: Well, again, I will take this subject to whatever might develop, but I really don't see where it is leading us.

A Some of these might have been discussed, but I don't have any recollection.

Q Now, at that first meeting with Sheib, Mr. Faggen was present at that meeting, wasn't he?

A I said I'm not sure. It is possible he was.

Q Did Mr. Faggen or Mr. Sheib disclaim any of the factual material that you have read in this document, Exhibit 3?

MR. COOPER: I object to it, if your Honor please.

THE COURT: First of all, he can't recall that Mr. Faggen was there for sure. So, let's deal with what we know. And rather than put words in his mouth at this point, Mr. Powers, if you don't mind, I will permit only a question as to whether or not he recalls Mr. Sheib at least saying anything further or raising any differences or issues so-called.

MR. POWERS: I will take that amendment to the question.

Q Do you understand the question, Mr. Rosen?

MR. COOPER: Your Honor, may I be heard for a moment?

THE COURT: I understand your problem, Mr. Cooper, but I want to tolerate the plaintiff. I have said that I will take this subject to connection. I don't conceive of its relevancy even from an adversarial point of view of plaintiff's but, nevertheless, for better or worse, I'm going to let him have some latitude here. Let's go ahead.

A I don't have any recollection of any disclaimers or any discussion of these matters.

Q In fact, you had no contact with the financial negotiations and the pricing of this deal, did you?

A That's correct.

Q Mr. Rosen, you had several subsequent meetings with Simon Sheib, didn't you, and Mr. Faggen was present at those meetings, too, wasn't he? Excuse me, I ask you, was he present at any of those meetings? Excuse me.

A I recall that he was present at some meetings, but I can't recall which meetings he was present at and which ones he was not present at.

Q Do you recall his speaking at the meetings?

A At those meetings at which he was present, I'm quite sure he spoke.

Q Do you recall any comments by Mr. Faggen with respect to any of the factual matters in Exhibit 3 at any of those meetings?

A I have no recollection.

Q Do you recall Mr. Faggen saying anything about the adjusted earnings of his company at any of those meetings?

MR. COOPER: I'm going to object to this, if your Honor please.

THE COURT: Well, I will allow this subject to connection. Go ahead.

A Five, six years ago. I just have no recollection.

Q Was there any discussion between you and Mr. Aronsohn or Mr. Robinson as to the substance of this Exhibit 3?

MR. COOPER: Your Honor, --

Q At the time you were handling this transaction.

THE COURT: Mr. Powers, I must say this is going a little far. I'm willing to give you latitude, but this is really a little much. This has nothing to do with your own theory of the case.

MR. POWERS: Your Honor, I'm trying to--

THE COURT: It's a most obvious point, it seems to me, now. How can we ask a lawyer who's involved in negotiations in a case of this nature testifying as to what somebody might have said to him internally in the course of preparing documents.

MR. POWERS: Let me rephrase the question.

Q Did you make any changes in these contracts to reflect any factual material which you have now seen in Exhibit 3 in evidence? And I ask you to read that.

MR. COOPER: I will object to that, if your Honor please. The contract speaks for itself.

THE COURT: First of all, before we get to this, gentlemen, if you just simmer down here, we might get somewhere.

Mr. Powers, I sustain the objection now on quite a different basis because I don't think we have laid the groundwork, although I think we can assume certain things. Let's not assume them. Let's ask.

Mr. Rosen, I take it that you participated in some redrafting as these meetings unfolded, that is, the meetings not only internally in your office but with Mr. Sheib's office?

THE WITNESS: Yes, sir.

THE COURT: All right. Who did the redrafting on your side, you or Aronsohn or both of you?

THE WITNESS: I did the large part of it, but he participated in it.

THE COURT: All right. Now, what is it that--

Q In connection with the redrafting, do you recall any discussions with either Mr. Sheib or Mr. Faggen directed at contradicting or eliminating any of the factual material that is contained in this Exhibit 3?

MR. COOPER: Objected to, if your Honor please.

THE COURT: Yes. First of all, as I understand Mr. Rosen, he can't recall specifically any conversations of Mr. Faggen, so let's not bring that back through the back door.

Second of all, I will allow only, and even this is subject to connection, as to whether or not he recalls any redrafting that he did or participated in, having to do with any financial information such as is shown on Plaintiff's 3.

Q The financial information is on the 4th page, Mr. Rosen.

MR. POWERS: Thank you, your Honor.

Q Is the question clear to you, Mr. Rosen?

A Yes.

The only recollection that I have is that the original draft submitted to us called for financial statements of Harold Faggen's companies, which were certified by a certified public accountant and prepared in the usual course. It became clear at the outset that no such documents had ever been prepared. And we, therefore, if we were going to proceed, had to come up with some alternate financial statement. And after thorough discussion, it was determined that Mr. Faggen's tax returns and a brief updated unaudited financial statement would be submitted and annexed to the contract as exhibits.

Q Do you recall any discussion--strike that.

Do you recall any request by Mr. Faggen or Mr. Sheib for the exclusion or the superseding of any prior factual material that Mr. Faggen had given to Titan prior to your getting involved in the transaction?

MR. COOPER: Objection, if your Honor pleases.

THE COURT: I must say I'm going to have to sustain that because I really don't understand that. Perhaps Mr. Rosen does, but if I'm going to be the Fact Finder, I think I have a right to say I would like to hear a question that I understand.

Q Mr. Rosen, did Mr. Sheib ask you at any of these negotiations to disregard any prior factual material that Mr. Faggen had supplied Titan?

MR. COOPER: I will object to the form of that question, your Honor.

THE COURT: No, I will take this subject to, if you understand it.

THE WITNESS: I understand the question.

A There were no discussions on that point. I believe there's a provision in the contract to that effect.

Q Did Mr. Faggen, at any of these meetings where he was present, ever ask you to disregard any factual material he had presented to Titan and prior to your getting involved in the transaction?

A I have no recollection that he did.

Q How many redrafts of the contract did you do prior to the closing, do you recall?

A There were several. I can't recall how many.

Q One thing you did is to break the Kaufman draft of an overall acquisition contract into four separate contracts, wasn't it?

A That is correct.

Q So that you had four essentially parallel contracts instead?

A Yes.

Q And you made some changes in the conversion price of the convertible debentures, didn't you?

A I believe that is correct, yes.

Q And Ben Robinson handled the negotiations on that, didn't he?

A No, Ben Robinson, I think, was out of the country during the bulk of that time.

MR. COOPER: If your Honor pleases, among other objections, I would like to note this for your Honor, that is, that counsel is examining counsel for Titan in a transaction in which this attorney represented Titan and is asking him as to transactions internally.

THE COURT: I'm well aware of that. I'm painfully well aware of that. But may I point out two things to you, Mr. Cooper: I have not lost sight of your position and that of your client in this case.

No. 2: There has been some very helpful information to Harold Faggen come out most recently within the last two minutes in answer to questions which you have objected to. So, keep that in mind, too.

Let's move ahead and get down to the nitty-gritties so we can finish this witness.

Q I show you a memo dated October 28, 1968, which you

provided to me from your files this morning. You provided it at your deposition. Does that memo refresh your recollection on any discussions that Ben Robinson was holding at or about the time you were working on this contract with respect to the terms? I'm calling your attention to the first paragraph.

A I understand.

It doesn't.

Q That's a memo from Ben Robinson from your office files, isn't it?

A To Tony Frank, that is correct.

Q And it deals with a conversation where Mr. Robinson says, "I spoke to Alan and told him to think in terms of the 3-year contract for Harold Faggen."

A Right. It's dated October 28.

Q Now, do you recall any other changes that were made in the Faggen transaction prior to its closing? Anything else come to mind?

A Well, there were several other changes. The whole gamut from some rather insignificant things to the question of whether the subordination provisions that were incorporated in the draft would be satisfactory to Titan's creditors.

Q And you did some rewriting on the subordination provisions?

A Yes.

Q Do you recall any other provisions you did some re-writing on?

A The registration provisions in the agreement were revised and the original Kaufman draft contemplated a separate contract in closing, and the final draft contemplated a simultaneous contract in closing.

Q At the conclusion of this contract, you worked on a set of exhibits for the contract, didn't you, involving certain factual matters?

A You say I worked on a set of exhibits. I don't understand what you mean.

Q Did you prepare a set of documentary exhibits for the final contracts?

A No. They were prepared by Faggen and his counsel.

Q All right. Now, in connection with the preparation of those exhibits, you had some discussions on them, didn't you?

A I'm sure we did.

Q Do you recall having any discussion on the number of clients that the Faggen Companies had lost in 1968?

A I have no recollection of that subject coming up at the time that the transaction was negotiated prior to the time the contracts were signed. It may have, but I have no recollection.

Q Do you recall any conversation on the degree of computer capability that the Faggen Companies had prior to the closing?

A No.

Q Do you recall any discussions on the responsibilities of sales representatives for the Faggen Companies prior to your closing?

A I don't understand what you mean by responsibilities.

Q The authority the various account executives had over accounts.

A No, I don't have any recollection of that.

Q Did you work on an employment agreement for Rose Dogan at or about that time?

A It's possible that I did.

Q Shortly after the contract closed, one of the employees left and took several of the clients with him, didn't he?

A Yes, he did.

Q What was his name?

A His name was Tabor.

Q T-a-b-o-r?

A Yes.

Q Sol Tabor?

A Yes.

Q Did you work on that matter for your office?

A With others in my office, yes.

Q That started around December 16, didn't it?

A It was right after the acquisition, but whether it was two weeks or three weeks or two days, I can't recall.

Q I show you Exhibit 8, entitled, "Income Projections," and ask you when was the first time you saw that document, if ever.

A I believe I saw this document at the time that I was preparing for the deposition.

Q Where did you see it?

A In a file in our office.

Q Was it a file marked, Benjamin Robinson Personal, or words to that effect?

A It's possible. I thought it came out of the Titan-Faggen file. At least, the copy that I saw I thought it came out of that file.

Q Had you ever seen this document or did you know anything of its existence before you prepared for your deposition?

A No.

Q It was in the same category as Exhibit 3 that I showed you before, wasn't it?

A Yes, it was.

Q And you found them in the same file in your office?

A That is correct.

Q How many discussions would you say you had on the contracts in terms of number of meetings, face-to-face, with Sheib and/or Faggen, between your engagement and the closing of the deal?

A Very, very difficult for me to say. I know I was occupied. A substantial part of my time was spent on this transaction between those two dates, but I can't recall.

Q Would it be fair to estimate at least more than five conferences?

A I would think so, yes.

Q Could you estimate how many telephone conversations with Sheib on the subject of these papers?

A An extensive number of conversations, both with Sheib and an associate of his at his office.

Q His name was?

A Carl Kaminsky.

Q Now, at your deposition you produced a file of limited partnership investments owned by some of the partners in your office. Did you bring that file with you today, sir?

A Yes, I did.

Q Can I get it for you?

A Sure. It's right in the back in that case with your firm's initials on it.

Q Without marking this as an exhibit so you can take

it back today, would you describe the nature of this file which is entitled, "Investment in Limited Partnerships."

MR. COOPER: I object to that, if your Honor please.

THE COURT: Before I know what this is about, I've got to find out what it is. So, I don't understand your objection. You're not being prejudiced in any way.

Can you tell us what this is, Mr. Rosen?

THE WITNESS: Your Honor, this is a record of certain investments with certain of the partners in our office in various limited partnerships. Principally owning real estate, in which they have invested with others.

THE COURT: All right. Thank you.

Q Now, does that file contain a limited partnership in which partners in your office are partners along with Harold Faggen, dated as of April 1, 1968? I think it's entitled, "Florida K-Marts Associates."

MR. COOPER: I object to any of this, your Honor.

THE COURT: Now, I don't blame you. This might be very relevant if you were suing the Robinson firm or Mr. Robinson himself, individually, but what it has to do here, I don't understand.

MR. POWERS: Your Honor, it goes to--

THE COURT: Mr. Faggen has every right to enter into a limited partnership with anybody he wants to, I assume, and

so do you.

MR. POWERS: The partnership relation goes to the trust Mr. Robinson put in his unaudited financial statements.

THE COURT: Again, that is simply splendid in your theory, but it has nothing to do with proof of your claim in this suit in this Federal Court.

MR. POWERS: I think, sir, with due respect, it goes right to the issue of why Mr. Robinson relied on the numbers presented by his friend on an adjusted basis.

THE COURT: Assuming that he did rely on the numbers, Mr. Powers, that is fine, but what good does that do you?

MR. POWERS: Your Honor, I think that this system of relationships between the two parties is all part of the softening up that helped to engender a deal like this.

THE COURT: If that's the case, what you may well be proving, in fact, I think this is what you are proving for many reasons, that quite contrary to the theory of the complaint in this action, that there was no reliance at all on these financial statements that you want to claim were relied upon. Quite differently, there were other things relied upon here by a sophisticated buyer, and that I must say from an adversarial point of view, you astonish me. You are creating defensive material against yourself, it seems to me, more than

anything else.

More than that, I don't see how Faggen can be accused of anything in this suit having to do with his being a limited partner with Ben Robinson, or perhaps other members of this firm, in the real estate field.

MR. POWERS: If this isn't disclosed to the other members of the Board at Titan or to other individuals investigating the deal--

THE COURT: Assuming that is all true, and assuming it is all necessary, that may be a problem for Mr. Robinson or one of the members of his firm, but it's not a problem for Harold Faggen.

MR. POWERS: I think it is, sir, and, again, with due respect, I'm not trying to bicker with you. I think it is because it represents a method by which the Chairman of the Board was induced to rely on the numbers, and others not knowing of the whole system of relationships underlying this were induced to go along with what those numbers were because of a friendship as contrasted --

THE COURT: I don't want to bicker with you, either, but this is so glib and so facile, and I have heard so much of it, that I want the record to be patently clear. You can mark this as an exhibit for identification, but it will not be received.

MR. POWERS: I understand. And I wasn't going to offer it in evidence, I was just going to establish the four or five limited partnerships.

THE COURT: Let's ask Mr. Rosen if he knows, without any extended discussion, what the facts are so the record is clear, if he knows it.

Mr. Rosen, stripped of all the hyperbole and rhetoric here, simply tell us, if you know, whether or not this file or any other information available to you indicates whether or not in early 1968 Mr. Robinson, Ben Robinson, your now senior partner, or any other member of the firm at that particular time in early 1968 was involved in any limited partnership with Harold Faggen.

THE WITNESS: I believe that it will show that, your Honor.

THE COURT: Do you recall about how many of these limited partnerships existed in which some member of your firm or more than one member and Mr. Faggen were limited partners in one of these real estate ventures?

THE WITNESS: 3, 4 or 5.

THE COURT: Fair enough.

Q Now, was there any written disclosure of these joint investments ,that you know of, to the Board of Titan in 1968?

A None that I know of.

Q Do you know of any oral disclosure to the Board?

MR. COOPER: I object to that. This witness wasn't on the Board.

THE COURT: That's right. And, beyond that, he's already told us he came into this picture after the Board met, as we all know, on the third week or, well, October 22, so how in the world can you expect--

MR. POWERS: Let me ask my next question to button it up.

Q Do you recall any oral disclosure of the fact that these investments were being made to Tony Frank or anybody else working for Titan when you were present at meetings with them in October or November or December of 1968?

MR. COOPER: I object to that.

THE COURT: Sustained as to form because I don't think it's clear.

Mr. Powers, please.

Do you mean to be asking him whether or not he knows whether or not Frank got any--

MR. POWERS: If any disclosures were made in his presence.

THE COURT: We don't even know yet that he was present at any conversations with Frank. I don't understand you.

Q Were you present at some conversations where Tony

Frank was also present, discussing the Faggen transaction?

A There were some phone calls and Tony Frank was present at the closing. He may have been present at one or more of the conferences.

Q While you were present at any of these conferences, where Tony Frank was present, was any statement made by Mr. Faggen or by anybody else as to Faggen being partners with Mr. Robinson and other members of the firm in several real estate ventures?

A Any statement --

MR. COOPER: I will object to that question.

THE COURT: Mr. Cooper, so the record is unmistakeably clear, I have understood for days that you have a continuing objection to all of this. There is no jury present. I am well aware, and you have heard me expostulate at least thrice today, not to mention previous days, of my extreme doubt that this has anything to do, even from the plaintiff's point of view, with their case. It seems to me, from the plaintiff's point of view, quite frankly, it's counter-productive. But be that as it may, I'm taking all of this to just get the record so in the event there is any appeal in this matter, at least the Appellate Court will know what was going on as best as possible.

Now, let's finish this off. You were interrupted,

Mr. Powers. You want to know what?

Q At any of these meetings, where you were present and Tony Frank was present discussing the Faggen acquisition, do you recall Mr. Faggen or anyone else making an oral statement with respect to his participation in real estate ventures with partners in your office?

A No recollection of that.

MR. POWERS: I'm almost through with this witness, sir.

Thank you very much, Mr. Rosen.

THE COURT: Mr. Cooper?

CROSS EXAMINATION

BY MR. COOPER:

MR. COOPER: Just two questions, Mr. Rosen.

Q Mr. Rosen, I don't think it was fully explored by counsel when he asked: You came to the Robinson firm when?

A A year after I graduated from law school.

Q Did you work as a clerk for them, or did you clerk any place else? What was your experience?

A I was a clerk for a Federal judge in this Circuit, and then I came to work for the Robinson firm.

Q I see. So that actually, other than clerking, this was your first job as a practicing lawyer in a law firm, right?

A That is correct.

Q Now, then, Mr. Rosen, you sent the revised draft back to Mr. Kaufman after you and Mr. Sheib had gone over it, is that correct?

A That is correct.

Q And that first revised draft was red lined by you to show the changes?

A Yes, sir.

Q The first one that went back dealt with the revision and the representations and warranties with respect to the financials that were going to be embodied in the contract, is that correct?

MR. POWERS: Objection, your Honor, I think the draft doesn't show that, and if he has the draft in court, why not show it to the witness.

MR. COOPER: I thought we could save a little time, but I can do it that way.

It's Defendant's Exhibit G. Your Honor has it.

THE COURT: Yes, I probably do. G. Wait a minute. At last.

Q I draw your attention, Mr. Rosen, to Exhibit 3--I mean Exhibit G, paragraph 3.1.

A Yes.

Q Do you see the underlining underneath tax returns including income statement?

A Yes, I do.

Q Is that in the original that was red lined rather than black on the Xerox?

A That is correct.

Q Okay.

Now, what I wanted to ask you on that connection, Mr. Rosen, did you transmit to Mr. Kaufman the income tax returns?

A Yes, I did.

Q Did he at any time raise any question with you with respect to the income as shown on the income tax returns?

MR. POWERS: Objection. Isn't that subject to the same problem I had in going into the inter-counsel discussions in the people representing Titan? I think I was foreclosed from inquiring into that, your Honor. And I have no--

THE COURT: You were certainly to an extent.

MR. POWERS: I have no objection to Mr. Cooper going into it had I the free right to go into all of that myself.

THE COURT: I understand. Let me have that last question repeated.

(Read.)

THE COURT: Who is "he"?

MR. COOPER: Mr. Kaufman.

THE COURT: I'm inclined to agree with Mr. Powers.

I did shut him off about these details internally. And I have to point out to you, if you want to press this, why I'm going to have to allow Mr. Powers to go back and go into all of this.

MR. COOPER: No, your Honor, I'm not pressing it on the basis of internal discussions between counsel. I thought that by reason of Mr. Kaufman's testimony here with respect to the negotiations and the fact that he had prepared the first draft of the contract, there was an issue raised by counsel regarding representations and warranties regarding income of these companies, and all I wanted to demonstrate through this witness was that Mr. Kaufman had received from Mr. Rosen's office, having been given them by Mr. Faggen's counsel, Mr. Sheib, the income tax returns.

THE COURT: Well, I see no reason why you can't ask Mr. Rosen if he transmitted either the tax returns or the Joseph Warren unaudited financials, but I don't know why we have to get into conversations over the phone with Ed Kaufman out in Los Angeles.

MR. POWERS: Sir, that last comment has been asked and answered. The witness said yes, he transmitted the tax returns to Kaufman.

THE COURT: I didn't say otherwise. I'm just making the observation.

MR. COOPER: I have no further questions, Judge.

THE COURT: All right.

Mr. Rosen, before one of us changes our mind, you better rush out of here with Leonard Sand and get back to business. Thank you.

(Witness excused.)

MR. POWERS: The next witness is Mr. Vincent Russo.

J. V I N C E N T R U S S O, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Russo, what do you do for a living, sir?

A I'm vice president and controller of Americana Hotels.

Q Is your basic employer American Airlines?

A Yes.

Q Do you work here in New York?

A Yes.

Q Did you used to work for Titan Group?

A Yes, I was assistant treasurer and controller.

Q Can you fix the period that you were working there?

A September 1960 to May 1969.

Q In your work at Titan, did you have any contact with the acquisition of the Harold Faggen Companies?

A Yes.

Q When did you first have contact with the Faggen acquisition?

A It was in the fall of 1968.

Q What was your assignment in that connection?

A Since they were becoming part of our company, my assignment was to determine what accounting treatment would be given to them to bring their assets and liabilities on to our books and to do related tax matters.

Q Who was your immediate superior in Titan at that time?

A Mr. McIntyre, Richard McIntyre.

Q Did Mr. McIntyre do any of the work, the accounting work, I mean, on the Faggen acquisition?

MR. COOPER: I'm going to object to that, if your Honor please.

THE COURT: I will allow a yes or no answer.

A Basically, I did the work. Or it was done under my supervision.

Q And you reported to Mr. McIntyre, is that right?

A Right.

Q In that connection, did you visit the office of Harold Faggen and his companies?

A Yes.

Q Can you fix a date for the first visit, roughly?

A I believe it was sometime in December.

Q Did you make any visit before the transaction was actually closed? If I could refresh your recollection, the closing was December 2.

A I really can't recall offhand.

Q Did you have any of your men in there before the closing?

A To the best of my recollection, all our work was done after the closing.

Q Now--

MR. POWERS: Your Honor, could I have the original exhibits down? I want to check something.

THE COURT: Which ones do you want, all of them?

MR. POWERS: I think I'm looking for 3C, if my memory serves me.

THE COURT: I don't seem to see any 3C.

Q I show you Exhibit 3B, and ask you if you can identify that. Have you seen that before?

A I have seen this Exhibit A before.

Q That's the third page of 3C?

A Right.

Q Can you fix the place where you saw that?

A I saw it in your office but obviously I had seen it before since this appears to be my handwriting on the bottom.

Q Is that your handwriting on it?

A Yes.

Q What are those pencilled notations on the third page of 3-C?

MR. POWERS: For clarity, your Honor, this is the document that was identified by Mr. Robinson. It's Exhibit A from Exhibit 3, and Mr. Robinson identified that this was his handwriting, "without investment income," and now we are identifying Mr. Russo's handwriting on the same document.

Q Are those pencilled notations on the document in your handwriting?

A They appear to be my handwriting, yes.

Q Do you recall the conversation or the situation in which you wrote those on the document?

A Well, what I have obviously done here is to eliminate Harold Faggen's personal income from these income figures.

Q And net down the adjusted corporate income overall, is that right?

A Yes.

Q And do you recall any conversation with anyone in connection with your writing that on the document?

A No, I have no recollection of any conversation.

Q Do you recall making any recommendations--strike that.

Did you do any checking of the balance sheet of the

Harold Faggen Companies prior to the acquisition?

A No.

Q Did Mr. McIntyre do any checking of it?

MR. COOPER: Objection, your Honor.

Q If you know. And I show you 3-B.

THE COURT: As I understand the witness, and you correct me, Mr. Russo, but I believe you said that McIntyre didn't do any work on this.

THE WITNESS: I said to the best of my recollection. I was his subordinate and he would have assigned that work to me.

THE COURT: Did you hear that, Mr. Powers?

MR. POWERS: All but the last. Would you read me back the last part of his answer?

THE COURT: All right.

(Read.)

Q Did you do any audit of the earnings of the Faggen Companies for the years '68, '67, '66 or '65, prior to the acquisition?

A No.

Q Did you speak to Mr. Faggen about any of these figures which are on the third page of Exhibit 3-B?

A I have no recollection of ever speaking with him on it.

Q Do you recall any discussions with respect to Ben Robinson and the Faggen acquisition at or about that time?

MR. COOPER: I object to the form of the question.

THE COURT: I must say, discussions with whom about what?

MR. POWERS: Mr. McIntyre, excuse me. I'm sorry.

THE COURT: Assuming he had conversations with McIntyre about Ben Robinson, what earthly good do they do you in this case; or, put more typically, what relevancy does this have?

MR. POWERS: I withdraw the question, your Honor.

Q Now, did you meet with Harold Faggen personally in or about November or December of 1969?

A Yes.

Q In your personal meetings with him what, if anything, did he say on the subject of his Companies? What did Mr. Faggen say to you in your first meeting with him?

A MR. COOPER: I object to that, if your Honor pleases, unless it can be shown it is relevant to anything in the issues.

THE COURT: We won't know until we hear it, so I'm going to allow it.

THE WITNESS: I'm sorry, what did he say to me?

Q Yes, in your first meeting. What did you talk about,

just in substance, what he said to you and what you said to him.

A I really don't recall our first conversation. All I can do is--I was down there to look at the financial statements and, obviously, I must have discussed his record-keeping and what was in the financial statements.

Q Did you discuss the accounts receivable with him?

A That was one of the assets, so we would have discussed receivables.

Q What did he say on that subject, if you recall?

A The first time I talked with him about receivables, the very first time. I obviously can't recall. We had discussions about receivables, and he had different types of receivables, some of them were more or less fixed, based on retainers, some of them were accrued on the basis of estimates, and so we discussed at different times during my conversations with him how to--how the receivables were in fact determined.

Q What was said on the subject of estimates?

MR. COOPER: May we have a date on these discussions, Judge?

THE COURT: Well, as I understand it, Mr. Russo, you believed that was after the closing, which, as Mr. Powers pointed out, occurred on December 2.

THE WITNESS: Yes.

THE COURT: Is that a fair--

THE WITNESS: I believe these took place after the closing and probably through January and February of the next year.

Q What was said on the subject of estimates?

MR. COOPER: If your Honor pleases, if this all occurred after the closing, I don't see how it can be relevant to this case.

MR.POWERS: Oh, I think it's very relevant, your Honor.

THE COURT: Well, I have some doubts that it will be certainly relevant, Mr. Cooper, but, on the other hand, I think again there's another area where the Court should afford Mr. Powers some latitude.

Go ahead.

Q What was said to you on the subject of estimating receivables?

A Well, the estimates were made by Mr. Faggen himself in many instances.

Q What did you say on the subject of accepting those estimates, if anything?

A Of course, we had no alternative and, again, in certain instances we had to accept his estimate. In other cases,

we could check later transactions to see if they were realized.

Q What explanation did he give you for asking you to rely on estimates?

MR. COOPER: If your Honor please, I object to all this.

Q If any.

THE COURT: Well, do you recall any conversation further about estimates from Mr. Faggen?

THE WITNESS: Just general conversations? I think I have covered it substantially. There were specific accounts we reviewed at certain times. I don't recall the name of them all, of course. But they were based on estimates.

Q And you took his word for it?

A Yes.

Q Were you under any instructions before the deal closed with respect to the scope of any accounting investigation you were supposed to do or not do?

MR. COOPER: I will object to that, if your Honor please. It's not binding on this defendant.

THE COURT: I certainly would agree that it is not binding in the classic state court sense, but, again, I have an earlier and perhaps more serious problem.

You want to know what his instructions were from whom?

MR. POWERS: From his own accounting superior as to the scope of inquiry, if any, that was supposed to be made before the Faggen deal closed.

THE COURT: First of all, were you given any instructions to accomplish any accounting work in respect to the Faggen acquisition before it closed?

THE WITNESS: It's very difficult to fix the time, whether it was before or after. My only recollection is that at one point in time, probably the earliest point in time, and this had to be before the close, I have a vague recollection of discussing with Mr. McIntyre specifically what I should do to evaluate the information that was furnished to us, and it's my recollection that he said it was Ben Robinson's deal. That's the earliest recollection that I have.

THE COURT: Were you given any financials or other information by McIntyre that you can recall?

THE WITNESS: I recall having seen something prepared by Mr. Faggen's accountants.

THE COURT: Do you remember the name of that firm?

THE WITNESS: I would know it if I heard it, but I don't recall.

THE COURT: Joseph Warren and Company?

THE WITNESS: Yes, that's it.

THE COURT: Do you recall it as of the date of those

financials that you were shown?

THE WITNESS: I know I--I'm quite sure I saw September 30.

THE COURT: Of '68?

THE WITNESS: Of '68.

THE COURT: Do you recall seeing any tax returns for Harold Faggen individually or for any of his companies?

THE WITNESS: I'm sure I saw returns for his companies, not individually.

THE COURT: And you think you received those from Mr. McIntyre?

THE WITNESS: Well, I'm not sure they were directly from him, but obviously they filtered through his office. Perhaps I saw some direct, I don't recall.

Q Did you do any verification of the balance sheet items before the close?

MR. COOPER: If your Honor pleases, I would just like to note for the record that this is an attempt on the part of plaintiff to impeach his own proxy statement of May 1969.

THE COURT: Oh, I understand you, Mr. Burton Cooper, but for heaven's sake, by this time you ought to understand me. I'm giving plaintiff latitude. This isn't quite as easy as you might make it. At least at this point. Maybe later it

will be as easy as you suggest. But let's give Mr. Powers a little latitude on this.

Q Did you do some verification of balance sheets?

A The only balance sheet verification I would have done or I did do was September 30 and December 31, '68.

Q All right. Did you go over the items that made up the balance sheet?

A Yes.

Q Did you go over the accounts receivable?

A Yes.

Q Do you remember any discussions before the closing of the acquisition on the nature of the accounts receivable?

A Again, I have problems fixing time. I don't recall whether it was before or after.

Q Did you have any discussions on the portfolio of securities in the Faggen Companies? Do you recall making any inquiries?

A We actually counted the securities.

Q I show you a memo dated April 29, 1969, which is already in evidence, your Honor, in this volume, and for the record I will refer to it from this volume, but I'm handing the witness the separate document, it's 261-A in this volume.

Now, did you write that memo?

A Yes.

Q It shows $1,019,000 in value on TGI's books of securities from the Faggen Companies. Was that value as of September 30, 1968?

A That represents a September 30 market value.

Q Was that the cut-off date for valuation purposes of all the assets taken over in the transaction?

MR. COOPER: I think the documents speak for themselves, your Honor.

MR. POWERS: I'm asking the accountant to tell us what cut-off date he used for valuation of the assets on the balance sheet where he says he counted some of those assets.

A We picked up the Faggen Companies in our consolidation as of September 30 or October 1, 1968.

Q And the value you took in there, the securities in their account was as of September 30, '68, is that right?

A That is correct.

Q Mr. Russo, after the acquisition was closed, did you have any contact with Mr. Faggen other than this one meeting that you were unsure of, whether it was before or after? Do you recall any meetings with Mr. Faggen after the acquisition closed?

A I had several meetings with him after, on accounting matters.

Q What was the substance of your accounting duties where

you came in contact with Mr. Faggen?

A Well, the primary one, of course, was getting our September 30 financials and our December 30 financials recorded on our books and brought into our consolidation.

Q Was there any accounting personnel in the Faggen Company that you dealt with other than Mr. Faggen himself?

A I believe his name was Joe Levine, yes.

Q Who had ultimate responsibility for accounting matters in the Faggen Companies?

A Mr. Faggen.

Q Do you recall the substance of any of your conversations with Mr. Faggen in terms of what he told you about his business, what you asked him about in your work?

MR. COOPER: May we have a time for this, Judge?

MR. POWERS: It's shortly after the closing I'm addressing, and in the months following.

A I'm sorry, would you repeat that?

Q Do you recall the substance of your conversations with Mr. Faggen on his accounting statements and business operations in the months following the closing? Can you characterize the substance of those dealings?

A I'm afraid the question isn't clear.

Q Can you recall any particular dealings with Mr. Faggen in the late winter, in the mid-winter, early spring

period of '69, '68, '69? Any particular discussions about his business or his balance sheet or his income statements?

A We had many conversations, of course.

Q How would you characterize those conversations with Mr. Faggen?

MR. COOPER: Objection, your Honor.

Q Did Mr. Faggen answer all your questions?

MR. COOPER: I will object to that. He hasn't stated there were questions asked. He speaks of conversations.

MR. POWERS: Withdrawn.

Q Did you ask Mr. Faggen any questions about his books during this period?

A Yes, I asked him many questions.

Q What was the general subject matter of the questions? Can you describe the categories you asked about, in general?

A Of course, I asked about all the balance sheet accounts and, obviously, some of the income accounts.

Q What was the nature of Mr. Faggen's response?

MR. COOPER: I object to the form of the question.

Q What did Mr. Faggen tell you?

MR. POWERS: I will rephrase it that way.

THE COURT: Perhaps it might expedite things, Mr. Powers, since we're after the event, I must say what are you really seeking here? I don't see any relevancy even from

your viewpoint.

Q Did you have any difficulties in getting information from Mr. Faggen?

A The difficulties were one in time. I found that it was very hard to get to him.

THE COURT: Very hard to what?

THE WITNESS: To get to, and I found it difficult-- to wait for him on several occasions.

Q Did you find--

THE COURT: Excuse me, I'm sorry, Mr. Powers, but I don't understand this.

You found it difficult to wait for Faggen personally, you mean?

THE WITNESS: I had to have discussions with him, and I'm saying that I was kept waiting many times and that's the difficulty.

Q Was he forthright in his answers to you?

MR. COOPER: I'll object to that.

THE COURT: Wait a minute, please, Mr. Powers. I know you are trying to save time or, at least, I assume you are, but what does this do, his individual judgment of his veracity at this point. Isn't that going a little far? Particularly since it is post-acquisition.

MR. POWERS: Question withdrawn.

Q In the post-acquisition period, did Titan attempt to audit the earnings of the Fuggen Companies for either '65, '66, '67 or the period of '68 prior to September 30?

MR. COOPER: I'll object to that, if your Honor please.

THE COURT: No, I will allow that.

A No, there was no audit.

Q There was no audit. Do you know of any audit for these four earlier period up until the date you left Titan in May of 1969?

A By Titan?

Q Yes.

A No.

MR. POWERS: Nothing further, Mr. Russo.

Excuse me, one more question.

Q Mr. Russo, on that letter I showed you of April 29, '69, showing $1,019,000 value on the securities, I show you a list of such securities--

MR. POWERS: What number are we on, sir?

THE CLERK: The next number would be 9.

Q --9 for identification, and ask you if you have ever seen that list before or had anything to do with its preparation?

A Well, the total agrees with the letter I wrote, so I

would assume it supports that particular letter.

Q Did you supervise the preparation of that list of securities?

A Well, we counted the securities. I don't really know whether my subordinate did or I did.

Q It was done in your department at Titan?

A Yes.

MR. POWERS: Your Honor, I would like to offer this in evidence now, if I may.

THE COURT: Have you seen this, Mr. Cooper?

MR. COOPER: I don't think so, Judge.

MR. POWERS: I think it's in our big bound volume.

MR. COOPER: Yes, I think it's what you have got on page 263.

MR. POWERS: Right.

THE COURT: Do you want to put it in nevertheless?

MR. POWERS: Yes, sir.

Any objection, Mr. Cooper?

MR. COOPER: I have no objection, no.

XXX (Plaintiff's Exhibit 9 received in evidence.)

THE COURT: Mr. Russo, in the fall of 1968, do you recall who were the members of the executive committee of the Titan Group?

THE WITNESS: Well, it's a little difficult, your

Honor, because that was the time, you know, there was a transition at that point.

THE COURT: I don't begrudge that. I just wondered if you recall. I have been waiting to hear from somebody if you could tell me.

MR. POWERS: We will stipulate that, sir, we've got the minutes, and it shows those who were present and those who were absent at the final meeting.

THE COURT: In other words, we will come to this at some point before we are through.

Anything you want to ask Mr. Russo, Mr. Cooper?

MR. COOPER: Yes, your Honor.

THE COURT: Good. Go ahead.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Russo, you have seen just now the exhibit which contains the list of securities. Do you recall that that list doesn't contain approximately a $173,000 worth of treasury bills which you also received from Mr. Faggen?

A I have to look at it.

Q Let me ask you--

MR. POWERS: Your Honor, I object to the question saying you also received from Mr. Faggen, because the memo that he referred to before says on its face that the treasury

notes were left in the Faggen Companies and there's no issue on the ultimate cash withdrawals from the Faggen Companies at a later point. That is covered in the Hatcher papers, too, and his questi[illegible], I believe misleads the witness into thinking those were transferred to the parent when they weren't by the face of the memo.

MR. COOPER: Your Honor, I think I can clear this up very quickly.

THE COURT: It's so easy, I'm sure you can. Go ahead.

Q Mr. Russo, you take notice at page 101 of the appendix through 110 there are a series of pages, all of which are signed by you, is that correct?

A Yes, that's my signature.

Q If you take a look at those, those are the receipts for what you got from Faggen and it gives the date of it, doesn't it?

A Yes.

MR. POWERS: I object to that, your Honor. They speak for themselves.

THE COURT: Well, I would quite agree but I think, Mr. Cooper, you must be leading up to something.

MR. COOPER: Yes, your Honor, I just want to demonstrate to Mr. Russo that he picked up at the same time as he

picked up the list of securities which has been marked Exhibit 9, he also picked up approximately $175,000 worth of treasury bills which were bearer bonds which didn't require transfer.

THE COURT: Well, I don't think Mr. Russo would dispute that. In other words, is there any real dispute about this?

MR. POWERS: No, sir, it says it right on the face of the memo.

THE COURT: In other words, Mr. Russo, as I understand it, the treasury notes were continued to be carried on the books of what you called, after acquisition, the Faggen Group.

THE WITNESS: Subsidiaries, yes, sir.

THE COURT: Subsidiaries.

Whereas the securities, which are listed in Exhibit 9, were really transferred to the books of the parent company or Titan Group, if you will.

THE WITNESS: They were physically transferred. I don't recall why the treasuries were not transferred but--

THE COURT: All right.

Q But you did get the treasury notes, too, didn't you?

MR. POWERS: I object to that. It's exactly contrary.

THE COURT: I don't think there is any dispute on that, Mr. Cooper.

MR. COOPER: All right.

Q Mr. Russo, is this prepared in your handwriting?

MR. POWERS: Has that been marked?

MR. COOPER: Not yet.

A This isn't my handwriting.

Q Did you ever see that paper?

A I don't recall having seen it.

Q Mr. Russo, would you remember a fellow by the name of Krall who worked for Peat, Marwick?

A I have a vague recollection of him, yes. At least the name I recall.

Q I show you this document and ask you if this was the document that had been prepared by Peat, Marwick or for Peat, Marwick by your group?

MR. POWERS: Objection. There's no foundation for that. He doesn't even know if the witness has ever seen that document before. And I have never seen it. I don't know what he's showing him.

THE COURT: Let's go back here, again.

Now, he's being shown a copy of a document, Mr. Powers, and the question really comes down to this:

Mr. Russo, have you ever seen this document before?

THE WITNESS: Well, I see my handwriting on the balance sheet here, so I have obviously seen it. On one of the balance sheets I see my handwriting. As a matter of fact, on two.

Q Mr. Russo, having looked at that, does the first sheet come to mind that you saw that at or about the time that you wrote on the balance sheets?

A No.

Q It doesn't?

A No.

Q Okay.

MR. COOPER: Your Honor, I'm running into the problem that I mentioned earlier about cross examination. This was produced pursuant to the subpoena.

THE COURT: I understand.

Q Mr. Russo--

MR. COOPER: I would like to offer this document in evidence, your Honor.

THE COURT: Shall we mark it as Defendant's Exhibit what?

THE CLERK: J.

MR. POWERS: I would like to look at it first to see if I have any objection, Mr. Cooper.

MR. COOPER: I showed you this before.

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MR. POWERS: I have never seen this before.

MR. COOPER: Okay, I'm not going to quarrel with you.

MR. POWERS: No objection.

(Defendant's Exhibit J received in evidence.)

Q Mr. Russo, in preparation for your testimony, did you have occasion to read over the affidavit of Mr. Hatcher that was submitted in this case?

A No, I didn't.

Q You have, prior to the preparation of your affidavit in this case--did you have occasion to read Mr. Hatcher's affidavit? This would take you back to--

A I might have seen that. I don't recall it. I think I might have seen it in my office.

Q You signed your affidavit on October 25, 1972. Do you recall then going over Hatcher's affidavit at that time?

A I believe I might have seen it, but I really don't recall it, no.

Q If you believe you might have seen it, do you know from reading Mr. Hatcher's affidavit and comparing them with the income statements attached to the contract documents that the audit that was conducted by Mr. Hatcher in 1972 established almost dollar for dollar the figures as shown on the income tax returns as the earnings of the Faggen Companies?

MR. POWERS: Objection, that's a summation, not a question. The document speaks for itself, it's in evidence.

THE COURT: No. I don't quite agree with you. I'm going to allow that providing, Mr. Russo, particularly with Mr. Powers and I interrupting, do you understand that question?

THE WITNESS: I understand it, but I'd have to see the documents. I certainly didn't compare Mr. Hatcher's affidavit against any documents.

Q I see. Well, if you didn't, then that's sufficient for my purpose.

THE COURT: Mr. Russo, you mentioned that these are--these notations--are in your handwriting. Is that true of all these figures?

THE WITNESS: There are two--if you are looking at--there's a combining balance sheet, and then I believe there are balance sheets for the individual companies. I noted my handwriting on two of the balance sheets of the individual companies.

THE COURT: All right.

Q When you met with Mr. Faggen, prior to the acquisition, do you have any recollection of whether that would be in November or December of '68?

A I don't recall that I did say I had met with him prior.

I really just can't fix the time.

Q The only reason I'm asking you that is because one of the answers to one of the questions that you gave, I thought you said you had met him in November of '68.

A I don't recall having said that. I believe I said that I started to work in November or December, somewhere around there. I'm not sure of the exact times.

Q Aha.

A I'm sure of January, February, March and, further, I'm sure of, and December--

Q While you may not have been at the offices of Titan, did you have a man working for you by the name of Sokolow?

A Martin Sokolow, yes.

Q Did you have a fellow by the name of Cannon?

A James Cannon, right.

Q Do you know whether those men were down in Faggen's offices between October and December of '68?

A I'm quite sure they were there in December. I don't recall whether they were there in November or prior.

Q Do you have any notes of any kind that would refresh your recollection as to dates, as to when you were at any of these places or any of the men were assigned?

A Well, my files were left with Titan.

Q Prior to testifying today, were you shown any of

those files to refresh your recollection, as to when you were there?

A Yes, I reviewed them.

Q You reviewed those files?

A Yes.

Q Are the files in court, do you know?

A I don't know.

MR. COOPER: Do you have those files, Mr. Powers?

MR. POWERS: They stand this high, Mr. Cooper. All the old work papers.

Q Mr. Russo, how much time did you spend going through those files?

A Oh, about an hour, an hour and a half.

Q Did you make any notes from those files?

A No, I didn't.

Q Did those files contain any papers in them which would have shown you the dates on which any person or persons were assigned by you to look into the books of the Faggen Companies?

A They indicated dates that certain things were done, yes.

Q Did they show where any of your people were in Faggen's place during October through December of '68?

A December, yes. I don't recall any November. I don't

recall any November. I don't recall any papers with November dates or having seen any papers.

Q How about October?

A No.

Q Would your papers show the dates you may have received the income tax returns?

A I did not see any. There possibly would have been correspondence, but I did not see any.

Q You didn't see any notes as to when you got them, is that what you are saying?

A Right.

Q You were not privy to any discussions with respect to the manner in which this transaction was priced, were you?

A I might have discussed it with Mr. McIntyre but I don't recall any special or specific conversation.

Q Would your notes have anything on there as to any discussions with McIntyre?

A Possibly they would.

Q But you don't recall seeing them now?

A I don't recall having seen them.

Q Do you recall discussing with Mr. McIntyre the fact that Peat, Marwick was a competitor of Faggen?

A Yes, I recall that.

Q And that was one of the reasons why Peat, Marwick

couldn't come in there, do you remember that?

A Yes.

Q Do you also remember discussing with Mr. McIntyre that Arthur Anderson would have been all right?

A I don't recall that specific conversation.

THE COURT: Incidentally, in that regard, Mr. Russo, this document, which you were just asked to identify, which we now call Defendant's J in evidence, am I correct in understanding that this was some sort of an audit done by Peat, Marwick?

THE WITNESS: Krall was a Peat, Marwick man, and I see the word "client" preceding his name, but I really don't know for what purpose that was prepared. I don't recall Peat, Marwick ever having used those numbers any place.

THE COURT: Anything else, Mr. Cooper?

MR. COOPER: I just want to check my notes one moment, your Honor.

I have no further questions, Judge.

THE COURT: Any redirect, Mr. Powers?

REDIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Russo, on that exhibit, does that exhibit--I show this to you again. Did Peat, Marwick audit the books of the Faggen Companies?

A No, they didn't.

Q Did they do it after the acquisition?

A They never did. The most they would do would be to review the work papers that Sokolow and Cannon and I had worked on.

Q Thank you.

MR. POWERS: Nothing further, thank you.

THE COURT: Thank you, Mr. Russo. You may be excused.

(Witness excused.)

MR. POWERS: May I have a five-minute break to talk to some of the witnesses we have, your Honor?

THE COURT: We will take a recess at this point, and after you have chatted with your witnesses, I would like to chat with you and Mr. Burton Cooper briefly myself. Horse shed you.

(Recess.)

MR. POWERS: The next witness is Mr. Fred Rohn.

F R E D R O H N, called as a witness by plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Rohn, what is your profession, please.

A I'm a certified public accountant, a partner in Touche

Ross and Company, one of the Big 8.

Q Where is your office?

A The offices are in New Jersey.

Q Is your firm the auditors for Titan Group, Inc., currently?

A Yes, we are.

Q How long has your firm handled the audits for Titan?

A This is the third year.

Q How long have you been an auditor?

A 25 years, approximately.

Q How long have you been a partner in Touche Ross?

A I've been a partner in Touche Ross and its predecessor, which merged with Touche Ross, more than 15 years.

Q What is your education or background, Mr. Rohn?

A I have an A.B. degree from Colgate University, a Master of Business Administration Degree from New York University, and I'm a C.P.A. in New York, New Jersey and several other states.

Q Mr. Rohn, have you had any specific experience working on corporate acquisitions?

A Yes, I have.

Q About how many corporate acquisitions would you estimate that you have worked on?

A Over a period of the last ten years, I would say 75

to 100.

Q Could you state to the Court the particular standards employed in acquisitions of private companies with respect to audited financials?

MR. COOPER: I object to the form of the question.

Q That are used in your experience.

MR. COOPER: I object to the form of the question.

THE COURT: Well, I'm inclined to agree, although I am not so sure I would put it entirely on form ground, Mr. Powers. I'm not sure I understand the confines of that.

MR. POWERS: Let me move back and ask a few more preliminary questions.

THE COURT: Would you please?

Q Have you participated in the acquisitions of private companies?

A Yes.

Q Have you participated in many such acquisitions?

A Yes, I have.

Q Is it customary or not customary to use unaudited financial statements as a basis for acquiring private companies?

MR. COOPER: Objected to, if your Honor please.

Q Based on your experience.

THE COURT: Mr. Powers, may I point out we have a contract which, by its terms, allows an acquisition on the

basis in part of unaudited financials or an unaudited balance sheet as of September 30. Now, for the life of me, what is the relevancy of this kind of an inquiry?

MR. POWERS: Your Honor--

THE COURT: Titan signed this agreement and doesn't deny it signed it.

MR. POWERS: Your Honor, I never bicker with you after 3:30. Question withdrawn.

THE COURT: Whether you do or you don't, I must say I'm puzzled. What has this to do with our case?

MR. POWERS: It's to indicate the standard for buying private companies.

THE COURT: I could almost take judicial notice of the fact that Mr. Rohn could tell us that and I would agree with it, but that's not our deal here, right?

MR. POWERS: The question is withdrawn, your Honor, I follow your--

THE COURT: Let's go on to something else.

Q Have you recently made a review of some accounting materials with respect to the earnings of the Faggen Companies before 1968 and since 1968?

A Yes, sir, I have.

Q Have you reviewed the work of people in Titan organization on that subject?

A Yes, I have.

Q Have you done any work on your own in connection with that subject?

A Other than the review? Are you asking me other than the review?

Q Yes.

A Yes, I have looked at the basis for the varying adjustments that were made in those figures and satisfied myself one way or the other accordingly.

MR. COOPER: I'm going to object and move to strike that, your Honor.

THE COURT: Before we strike it, I'm not sure I understand what you are saying, Mr. Rohn. Apparently you reviewed certain work sheets, financials and other things from the files of Titan Group?

THE WITNESS: Yes, I did.

THE COURT: Now, was there anything else you investigated or reviewed?

THE WITNESS: Not as far as documents are concerned, no.

THE COURT: All right. Next question.

Q I show you Plaintiff's Exhibit 10 for identification and ask you if you are familiar with that document.

A Yes, I am.

Q Could you explain to the Court what that document is?

MR. COOPER: If your Honor please, I don't know what he is referring to.

THE COURT: Generically, I think he can tell us what it is.

MR. POWERS: That's right.

Q What is it, Mr. Rohn?

A It's a four-years' summary covering the period 1965 through 1968 of the Harold Faggen Associates, Inc., and Companies' net income pre-tax adjusted to the basis which prevailed after the acquisition, starting off with the net incomes, as shown on the cash basis from the income statements and adjusted to what is the accrual basis of accounting.

Q Does that document contain certain additional adjustments added to earnings?

A Yes, there are adjustments to earnings from the cash basis to the accrual basis, and also proforma adjustments that are required to bring it to an after-acquisition basis.

Q Did you review the material which makes up that document?

A Yes.

MR. POWERS: I would like to offer this in evidence, your Honor.

Mr. Cooper, to save you some trouble, this is Exhibit E that is in the Hatcher affidavit that is already in evidence. I had it typed up for trial purposes. It's otherwise identical.

MR. COOPER: The Hatcher affidavit is not in evidence. I object to that, and I object to this, too.

THE COURT: Wait a minute. I think it is in the sense that we stipulated that the Court of Appeals' record would be part of the record of this case and, as I recall it--

MR. COOPER: Your Honor, if you recall, I said that I stipulated to everything but the Hatcher affidavit, and Mr. Powers agreed with me at that time.

THE COURT: Well, you may be right. I had just forgotten it, if that is so.

MR. POWERS: Sir, whether or not it is so, this is a document carefully prepared, which gathers together the four-years' income, and I would like to offer it in evidence.

THE COURT: Do you know who prepared this document, Mr. Rohn, this particular document?

THE WITNESS: Yes, I do.

THE COURT: Who was that?

THE WITNESS: It was prepared by Mr. Williams of the company.

THE COURT: Mr. whom?

THE WITNESS: Mr. Herbert Williams.

THE COURT: Herbert Williams?

THE WITNESS: Yes.

THE COURT: Do you know when he prepared that?

THE WITNESS: Within a time frame of the last several weeks. I wouldn't know within that period when he prepared it.

THE COURT: Now, wait a minute. Let's see if I understand you.

He prepared this document, which we now call Plaintiff's 10 for identification, within the last several weeks, is that right?

THE WITNESS: Yes.

THE COURT: Well--

MR. POWERS: Could I clarify this for your Honor?

THE COURT: I think you better because if somebody else prepared it, why don't you produce that person?

MR. POWERS: They're here in Court, your Honor, but he is a reviewing auditor for Titan, acting as a witness.

THE COURT: Maybe you can get Mr. Rohn to explain.

MR. POWERS: And Mr. Williams is going to appear as a witness and Mr. Williams prepared it from work papers and audit material left by Mr. Hatcher, and it is essentially the

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same set of numbers and the same document that Hatcher had put in, but it's been redone and re-reviewed.

THE COURT: Well, may I suggest that since we know Mr. Cooper is objecting and since we know Mr. Rohn did not prepare it, I am going to not receive this at this moment until we get a little clearer indication from the preparer just what he relied on. But, if you want to ask Mr. Rohn any questions about this, I will take them, all subject to connection, depending on what Mr. Williams says.

MR. POWERS: Fine. That will work out fine, your Honor.

THE COURT: In other words, Mr. Cooper, the ruling is that I'm receiving this subject to connection, meaning by that oft-used phrase simply that we will have to expect that Williams will be produced and be available for examination and cross-examination on his preparation.

MR. POWERS: Williams is in the courtroom here today, your Honor.

THE COURT: I accept that, I'm just explaining the rule.

Q Would you state to the Court the basic principles underlying the preparation of this 4-year net income pre-tax statement?

MR. COOPER: I'll object to that. The witness didn't

prepare it.

Q Mr. Rohn, did you review this document?

A Yes, I did.

Q Did you review the work materials that Mr. Williams used in preparing it?

A Yes, I did.

Q Did you interrogate Mr. Williams on it?

A Yes, I did.

Q Was the interrogation and review of material which you did in connection with this document any different than the work that an outside auditor normally does in reviewing a particular accounting document prepared by inside accounting personnel of a client?

MR. COOPER: Objected to.

THE COURT: If you understand that question, Mr. Rohn, why, I will allow it to be answered.

THE WITNESS: Yes, I understand it.

A The answer is yes.

Q You used your normal standards of interrogation and verification, is that right?

A That is correct.

Q Now, Mr. Rohn, would you state to the Tryer of Fact what the basic principles are that were used in preparing this document as to four years of income in the Faggen Companies

with certain adjustments?

A Yes. There was, as a starting point, cash basis statements prepared for the four years ending with fiscal 1968.

MR. POWERS: Your Honor, in case he testifies in any details, you might want this before you. I have an extra copy.

THE COURT: All right. Thank you.

Q Go ahead, Mr. Rohn.

A It starts off at the top with the cash basis income statements for each of the fiscal years for all of the six years for the four different entities involved, and comes to a total of those four.

Now, there are two types of adjustments that are required in order to adjust the cash basis income to the accrual basis income on a proforma basis, taking into account the on-going operating--the on-going operating results proforma added for the future, based upon what the adjustments have been in the past.

Q Before we leave that item, what are the two accrual adjustments that were added in?

A The accrual adjustments that were added in were the fees and--

Q Added or removed. I'm asking you to explain the accrual adjustment.

A Yes, if I may, let me just explain the adjustments as they are. You start with the cash income, which is on the total net income line. The accrual adjustments to convert from the cash to accrual method are shown, are fees and retainers and vacation-pay items. In both cases, these are adjustments which reduce the cash basis income at that point.

Q For 1968, how much did the adjustments reduce the cash basis income, for '68?

A For 1968, the adjustments reduced the total by $5,523.

Q So the only change going from a cash to an accrual basis for '68 is $5,500, is that right?

A That is correct.

Q And what change did the accrual adjustments cause in '67?

A A reduction--excuse me, an increase of $17,655.

Q So for '67, your adjustments gave credit for an increase in income?

A That is correct.

Q All right. Now, what are the proposed proforma adjustments in that column that says, "Faggen's proposed proforma adjustments;" what is the nature of those, in general, first?

A Well, the proforma adjustments are those adjustments

which on a logical basis would not be in operations for the future, based upon the future way the company was expected to operate, based upon the purchase-sale agreement.

MR. COOPER: Your Honor, I'm going to object to this kind of testimony. It's totally irrelevant to the issues in this case.

THE COURT: Well, I'm not so sure I agree with you, but, in any event, there's no point in arguing that because I'm only taking this subject.

Q Now, what are the nature of the adjustments that were added into income for these four years?

A Well, there are four kinds of adjustments. Some go one way and some go the other way. There's an adjustment of back for federal--adding back the federal, state and city taxes, which is an adjustment required to bring back the figures to a pre-tax income.

Q Pre-tax. What adjustment was made with respect to personal accounting services income?

A Well, there's a difference between the accrual and the cash basis on accounting services income, and there's a line here in which that has been adjusted for each of the four years and in amounts of approximately $5,000 per year.

Q That's an add-on that the Faggen Companies were given credit for in this presentation?

A That is correct.

Q What is the item"reduction in Harold Faggen's salary, $50,000 limit." What does that mean?

A Mr. Faggen,during this four-year period, had taken salaries in excess of $50,000 and I believe that the on-going relationship between him and the company was to establish his salary at a $50,000 basis. Therefore, the company in these figures was given credit in its income computation for the amount between what his salaries had been during that period of $50,000.

Q And this was done on a consistent basis for each of the four years?

A Yes, sir, it was.

Q Based on his actual salary withdrawals for each year, is that correct?

A Yes, that is correct.

Q And does that mean that if his salary for '68 was a $150,000, he got a different credit as contrasted with his salary in '66 of, say, $70,000.

A That is correct.

Q All right. Now, in this connection, I show you plaintiff's exhibit 1 for identification, which is a list of adjustments prepared in Mr. Faggen's handwriting. Now, were certain of these adjustments, which are only for 1968, the

nature of the adjustments that were added in for all four years on this Exhibit 10?

A That is correct, yes.

Q Now, are some of the adjustments that are Mr. Faggen's handwriting on Exhibit 1 not entered into on Exhibit 6? Are some of them left out?

A Yes, that is so.

Q All right. Now, is one of them that is left out pension over-funding, pension prepayment?

A Yes, it's called pension prepaying on this exhibit.

Q Mr. Rohn, if you know, what was the reasoning behind not giving Mr. Faggen credit for a $64,000 in pension over-funding for '67 and not giving Mr. Faggen credit for any pension overfunding in any of the three preceding years?

A Yes. The reasoning is as follows: There were pension fund payments in each of the four-year periods. I am not in a position to know whether there was overfunding or not overfunding. However, giving credit for a pension prepayment of some $58,000 at fiscal 1968, takes into account the fact that there would then be practically no pension payments during that period whatsoever and, obviously, pension payments were part of the on-going relationship between the company and its employees.

Q Were those pension payments made for all four of those

years?

A There were pension payments made for all of those four years. The figures vary, as I recall, from year to year.

Q Do you recall the rough average of what the pension contributions were over four years?

A I don't recall the rough average, Mr. Powers. I do recall that the 1967 figure was higher than the 1968 figure.

Q Now, did you give any consideration to a vacation pay accrual as a deduction from adjustments?

A No, we didn't give consideration to a vacation pay accrual.

Q Do you know anything about an accrual of vacation pay on the books of the Faggen Companies as of '68?

A I don't have any figures or any documents to indicate there was any such accrual on the books of Faggen or any of its working papers. I don't recall that.

Q All right. If I could perhaps refresh your recollection, I will show you something.

A Okay.

Q I show you page 237-A of the record on appeal. Have you read this material prior to coming to court, particularly the first full paragraph on the page?

A Yes, I have.

Q Does that refresh your recollection with respect to

vacation pay accruals from the books of the Faggen Companies back in '68 and previously?

MR. COOPER: Your Honor, I must say that--the witness didn't say his recollection needed refreshing and counsel is volunteering it for him.

MR. POWERS: I think the witness said that very clearly. He said, "I don't recall the vacation pay accrual item."

THE COURT: I can only ask you, Mr. Rohn, did you ever have any information in the first place about such an item?

THE WITNESS: Yes.

THE COURT: You did?

THE WITNESS: Yes.

THE COURT: Therefore, does this information, whatever it may be that Mr. Powers is pointing to, does it refresh that recollection?

THE WITNESS: Yes, it does.

THE COURT: Go ahead.

Q What was the principle for treating the vacation pay accrual--let me strike that.

Now, the accrued vacation pay on the books of the Faggen Companies was an on-going cost of doing business, wasn't it?

A Yes, it was.

Q That would have represented a deduction from income, wouldn't it?

A Yes.

MR. COOPER: If your Honor please, he's now leading the witness through everything.

THE COURT: I doubt Mr. Rohn is going to be led to that extent. Go ahead.

Q What, if any--strike that.

In Exhibit 1, in Mr. Faggen's handwriting, was there any adjustment contemplated for this vacation pay deduction from income?

MR. COOPER: I object to that. He wouldn't know.

THE COURT: Yes, contemplated by whom?

MR. POWERS: Mr. Faggen in his presentation.

THE COURT: How would he know? We don't even know--

MR. POWERS: It's on this Exhibit 1. It's either in here or not in here. And he reviewed it.

THE COURT: Instead of putting it in that way, then, since I have no reason to believe from what I hear that Mr. Rohn even knows Mr. Faggen or knows that this was prepared by Faggen or, indeed, if it was in fact, why do you get into that? You're showing him Plaintiff's Exhibit what?

MR. POWERS: 1.

THE COURT: All right. Why don't you gear it to that instead of raising all these side issues.

Q Was there any deduction from the adjusted income shown on Exhibit 1 for accrued vacation pay in '68 in the Faggen Companies?

A No, sir.

Q Did you take any deduction in your four-year presentation for accrued vacation pay?

A Yes, sir.

Q What deductions did you take for accrued vacation pay?

A Well, there was a thousand for 1965, $2,000 for 1966, $3,000 for 1967, and $4,000 for 1968.

Q After refreshing your recollection from the Hatcher material you just looked at, what was the total magnitude of the vacation pay accrual that was on the books of the Faggen Companies in '68? If you would like, I will show you that page again.

A Yes, I would like to see it.

Would you ask the question again?

MR. POWERS: Would you read the question back to the witness, please?

(Read.)

MR. COOPER: Your Honor, I must take exception to counsel's manner of questioning this witness. This witness

has testified that he himself had gone over, verified and interrogated whoever it was who prepared this material, and had gone over it himself, and now he's taking him through another person's affidavit for the purpose of asking him questions relating to that affidavit. I object to that form of direct examination.

THE COURT: It certainly isn't very impressive.

MR. POWERS: I have no intention to go into this affidavit at all. It was merely to refresh his recollection on a dollar item that he said he couldn't recall.

THE COURT: That's what I understood it to be, and to that extent, I will allow it.

Q What was the magnitude of this vacation pay accrual on the books of the Faggen Companies in '68?

A Well, on the books of the Faggen Companies, I couldn't tell you, Mr. Powers. I can tell you that the material that Mr. Hatcher and his staff prepared, and which I reviewed, indicated that there was a magnitude of vacation pay accruals that hadn't been booked of something like $25,000.

Q In your adjustments for these four years, did you reduce income by a full $25,000?

A No, sir. That would haven't been appropriate because there was a build-up in accrued vacation pay over a period of years. While it was not--while I could not find any material

in what I reviewed to indicate that there was an exact calculation available as to the build-up of it, it was clear that some of the accrual did not apply entirely to 1968.

As a result, there was a somewhat small adjustment made to show that there shouldn't be an adjustment for those in these figures.

Q Right. Now, I show you Exhibit 1 and call your attention to salaries to 12-31-68, can be treated as loans. Were two add-ons of $22,950 and $13,162 and similar salary--strike that. Just these two additions to income. Now, did you give those any effect in preparing the adjustments for the four years?

A No.

Q What was the reason for not including those in the adjustments?

A Well, the papers indicated that one of the bases of cash accounting that had been followed by the Faggen Companies was at year-end to prepay certain salaries covering a future period, and on a cash basis to show those as expense for that particular period.

To adjust to the accrual basis, it would be perfectly proper for balance sheet purposes as of the ending 1968 date to say, yes, there is a prepayment involved here. However, in making the calculation as it applies to the income statements,

one would have to go back to each of the four-year periods and see what the prepayment would have been at the beginning of each accounting period and the difference would be the adjustment to the earnings for that particular period.

Q For the four-year presentation here in this Exhibit 10, the actual salary cost of doing business was given effect, is that right?

A Yes.

MR. COOPER: I object to leading the witness, your Honor.

THE COURT: Well, if that is leading, it isn't very harmful.

Q Now, were there any other adjustment items on Exhibit 1 that you didn't include in your adjustments, such as, for instance, the item "work in process," $25,000?

Q Yes. In the Exhibit 1, there is an adjustment adding back to income for the 1968 year, an item of $25,000 called, "Special Work in Process." My review indicated that this was a one-shot kind of potential income item, which represented a matter that was in litigation and during the three years that I saw subsequent to the 1968 date, this item had not been collected.

Q Is it your testimony that an item of income, which is extraordinary, receives different accounting treatment from

operating income?

A Yes, sir.

MR. COOPER: I object.

Q Now, were there any other adjustments on this sheet, Exhibit 1, that you did not give any effect to?

A Yes, there is one other adjustment.

Q What is that?

A It's called expense items that will not recur.

Q That's $32,800 for 1968?

A Yes, $32,800.

Q Now, what reason did you have for not adding that back into income?

A We found no material to indicate that this was a proper adjustment. In that the subsequent expenses of the Faggen Companies was such that we couldn't isolate that there were any such items that would not recur. We have no back-up or working paper to support any kind of such adjustment.

Q I show you a document which we will mark as Exhibit 11.

XXX (Plaintiff's Exhibit 11 marked for identification.)

Q 11 for identification, and ask you to tell us if you have seen that document before.

A Yes, I have.

Q Could you state to the Court when you saw it?

A Yes, I saw this within the last two weeks.

Q Did you review the numbers which made up that document?

A Yes, I did.

Q Did you interrogate the people who prepared that for you?

A Yes, I did.

Q Was this prepared in-house by Titan and reviewed by you essentially in the same manner as Exhibit 10?

A Exactly the same.

Q Are you familiar with the contents of that document?

A Yes, sir, I am.

MR. POWERS: I would like to offer this in evidence, your Honor.

It is Exhibit 11. It's a statement of income adjusted based on represented income for the four years preceding the acquisition, and actual income, and then a continuation for the three years following the acquisition relating to the Faggen Companies.

MR. COOPER: I will object to it, your Honor.

THE COURT: May I see this document, please?

Q Mr. Rohn, was this prepared from the books and records of Titan with respect to its Faggen Company subsidiaries?

A Yes, it was.

THE COURT: Again, was this Mr. Williams who did this, Mr. Rohn?

THE WITNESS: Yes, sir.

THE COURT: All right. We will receive this on the same basis that we received 10.

MR. COOPER: If your Honor pleases, may I just note for the record the basis of my objection.

I believe, your Honor, that this is actually a fact finder's problem, and it is not an exhibit which has any value. You will notice that it speaks of represented income and it speaks of over-statement. I don't believe that this witness or any witness in the accounting department is qualified to make that statement. I think that is a question of fact for the Court to determine.

THE COURT: Well, I don't agree with that. In any event, in large measure, what you are saying may be determined on what we hear from the preparer, Williams. I am only taking this subject to that.

Q Now, taking Exhibit 11, could you state in a summary form what it purports to convey? As an accounting document.

A Well, it covers an 8-year period for all of the Faggen entities and for the first 4-year period it shows the amount of income that is marked represented net income as being

the income as taken from the cash basis schedules that are part of this matter. I'm not referring to it in its proper form, perhaps, but the represented net income, I believe, comes from Mr. Faggen's figures.

The actual income is the actual income shown on the tax returns of the companies for that particular period.

Q Is the income that is presented for the years after the acquisition, '69, '70, '71 and '72, was that prepared from the books of Titan in connection with its Faggen subsidiaries?

A Yes, the second column, the actual income column, is rounded out to the nearest thousand, is the actual income reported.

Q All right. What is the foundation for the first column, represented net income for '69, '70, '71 and '72 after the acquisition?

MR. COOPER: I object to that, your Honor. This is all post-acquisition, it really has nothing to do with the issues in this case.

THE COURT: It does to this extent: It is geared to the claim of Titan that your client made a representation prior to closing to the effect that the earnings would increase at a 15% annual growth. Now, again, Mr. Cooper, I understand your point, but that doesn't mean it necessarily keeps it out.

Q Now, would you explain to the Court how that first column, represented proforma net income, was determined for the years '68 through '72?

A Yes. Those figures in that first column for those last four years are a 15% compounded growth rate based upon the 1968 figures. That's how it gets up to the million dollars in 1972.

Q Right. Now, I take your attention back to the accounting principles used for valuing assets in connection with an acquisition of a company. If a company like Titan buys a group of companies like the Faggen Companies, and it takes over a portfolio of securities as some of the assets, what is the principle for fixing the value of those securities on the books of Titan?

A The principle for fixing the value of the securities of Titan would be the fair market at the time they acquired the investments.

Q When you say "at the time", are acquisitions normally based on a cut-off in valuation date where all of the various transactions are deemed to occur as of that date?

A The date on which the closing takes place.

Q Or some other date if it is agreed to be another date, is that right?

A Yes.

Q I show you a summary which we will mark Exhibit 12. I have used up my stickers.

XXX (Plaintiff's Exhibit 12 marked for identification.)

Q Have you seen that document before?

A Yes, I have.

Q Did you review the material that went into that document?

A Yes, I did.

Q Can you describe the nature of that document to the Court?

A Yes. This is a schedule summarizing the cash and securities that were transferred to and from Titan from October 1, 1968 through January 26, 1973.

Q From the Faggen Companies?

A From the Faggen Companies.

MR. POWERS: I would like to offer this in evidence, your Honor.

MR. COOPER: Your Honor, I'm going to object to this exhibit. This is far more than what the witness has testified to and it's objectionable on other grounds as well.

THE COURT: Who prepared this, if you know, Mr. Rohn?

THE WITNESS: It was prepared by Mr. Williams.

THE COURT: And Williams, he's not an employee of Touche Ross; he's a Titan employee?

THE WITNESS: Yes, he's the treasurer of Titan.

MR. POWERS: He's the chief financial officer of Titan.

THE COURT: Again, 12 will be received for whatever it is worth on the same basis, subject to Williams' appearance.

Q Now, could you state for the Tryer of the Fact in summary form the substance of this exhibit in terms of dollars and cents.

THE COURT: What's the point of that, Mr. Powers? You know, it's all here.

(Plaintiff's Exhibit 12 received in evidence.)

Q Mr. Rohn, I show you a document which we will mark Exhibit 13 for identification, and ask you if you have seen that document before.

XXX (Plaintiff's Exhibit 13 marked for identification.)

A Yes, I have.

Q Was that prepared by Herb Williams, too?

A Yes, it was.

Q Did you review it?

A Yes, I did.

Q Could you state to the Court the substance of that document?

A This is a back-up sheet which shows the schedule of payments made to Harold Faggen and Rose Dogan and/or for their

account from the date of acquisition through January 28, 1973 and supports the previous document you showed me.

Q This is the back-up supporting material for each year in support of Exhibit 12, is that correct?

A That is correct. Yes.

MR. POWERS: I would like to offer this in evidence.

MR. COOPER: Your Honor, I'm going to object to this not only on the ground that Rose Dogan is not a litigant but she didn't marry Mr. Faggen until two years after this acquisition, and this exhibit is designed to charge Mr. Faggen with payments made to her during the period that she wasn't even married to him.

THE COURT: If that is what this exhibit is intended to do, I wouldn't worry muchabout it at this stage. Just because a document goes into evidence doesn't mean that it captures the day, the battle and the war. Now, you know better than that. Again, I am receiving 12 and 13 subject to connection.

XXX (Plaintiff's Exhibit 13 received in evidence.)

Q Now, Mr. Rohn, are you acquainted with the concept in acquisitions of valuing companies based on multiples of earnings?

A Yes, it's a frequently used method.

Q Could you explain for the record what that concept

means in terms of valuing the companies in an acquisition?

MR. COOPER: I object to that.

THE COURT: I'm not going to cut you off in terms of the subject matter, Mr. Powers, but, again, why do we fish around generally, particularly with a witness like Mr. Rohn? We know what happened here. Kaufman told us. Now, what's the point of this?

Q Well, I take you back to 1968, Mr. Rohn. Can you state to the Court, from your own experience during that period, what multiples, if you know, were being used for various types of companies for valuation and acquisition purposes, based on your own experience in the field?

MR. COOPER: I'll object to that.

THE COURT: At the very least, can't we agree to confine it to private companies?

MR. POWERS: Absolutely. The distinction is between growth companies and companies that are not growth companies and high-asset companies and personal service companies, and I would like to obviously establish that--

THE COURT: Here we have an accountant who purports to know the details of this acquisition. If there's some ultimate question you would like him to answer or give his opinion on in terms of what the appropriate multiple would be for this company, I will take it for whatever it is worth,

but let's not go around all the rules in the game in 1968 which was a very, very dubious year in hindsight. We know it was the apogee of silly acquisitions by a lot of companies and individuals who should have known better.

Q Mr. Rohn, sticking with the Faggen Companies, what would have been the appropriate standard for valuing them as an acquisition in '68, based on your review of Exhibit 11, their income before and since, over a 9-year period?

MR. COOPER: I'll object to that.

THE COURT: Yes, let's not elicit on post-acquisition matters at a time when Titan was in grave difficulties in many of its financials.

MR. POWERS: Consider the question modified.

THE COURT: Let's stick to what was going on as of September 30, 1968, as he understands it. Now, frame a new question.

Q Can you tell the Court what would have been the valuation standard for buying the Faggen Companies as they stood in the fall of 1968?

MR. COOPER: I object to the question, your Honor.

THE COURT: Well, I will allow it if Mr. Rohn can understand it.

THE WITNESS: Yes. But I'll have to spend a couple of minutes discussing it, because it's not a yes or no question.

Q Go ahead. I understand.

A This was a small group of operations. It was not a big company, and it was a service company as well. A multiple of ten times pre-tax earnings is a multiple that one would apply to a growth situation, and I must define the word "growth". Growth can be best defined in the sense in which I'm using it by the extraordinarily large potential income recognition that can be gained through the operations of that entity without the use, or in certain instances, of any additional capital. Therefore, this company, based upon ten times of pre-tax earnings, or roughly 20 times the pre-tax earnings, in my opinion, would have to be a company that had a very unusual growth potential quality.

In addition, the fact that the growth rate--the growth rate would have to be so large to promote that kind of a multiple, particularly in this kind of a situation because we were dealing with a small entity or a group of entities here. When one is dealing with a company in which pre-tax earnings are less than five or six hundred dollars, one is always concerned about survival and the viability of the company rather than its on-going growth potential.

And I would say that my opinion is that this was an extremely rich multiple to be applied to even a company that was purported to have tremendous growth possibilities.

Q Now, what value, based on 1968 standards, would you apply to the Faggen Companies?

MR. COOPER: I object to that, if your Honor please.

THE COURT: Well, again, there's confusion, Mr. Powers. Are you asking him about what he would do accepting the information as compiled by Mr. Williams is true, or are you asking him to accept something else as being true as of September 30, 1968? We don't know.

MR. POWERS: Thanks for the help.

Q Accepting the information you received from Mr. Williams on the net worth of the Faggen Companies and on their earnings, in '68 and in the three years preceding, what was the value of them back in the fall of '68?

MR. COOPER: Again, I'm going to object, your Honor. This witness isn't qualified to determine what a willing purchaser would pay.

THE COURT: No, no, no, of course not, Mr. Cooper. I think Mr. Powers has misspoken. I think he wants to know the multiple that Mr. Rohn would suggest, isn't that about it?

MR. POWERS: Multiple and overall result of applying that multiple. Either one.

THE COURT: One thing at a time.

Q What multiple would you suggest, based on the information you received from Mr. Williams on net worth and the

actual income during that period?

A I would say a multiple of 7 to 10 times after tax earnings would be an appropriate multiple.

Q And what effect, if any, would you give to the net worth?

A I think the net worth is part of the package and is built into the multiple that I have used.

Q And, in terms of the figures you have seen for the four years preceding 1968 and including 1968, what would be the total value that you would put on the package?

MR. COOPER: I object to that, if your Honor please.

THE COURT: Now--

MR. POWERS: The question is merely carrying out the arithmetic on the multiple.

THE COURT: I understand, but there's something I'm a little puzzled about, and I think Mr. Rohn spoke it but I didn't get it. You said you would think the appropriate multiple would be 7 to 10 times after tax?

THE WITNESS: Yes, your Honor.

THE COURT: Income?

THE WITNESS: Yes, your Honor.

THE COURT: All right. Forgive me. I missed that. Now you want him to do the multiplication?

MR. POWERS: When he was testifying before, he said

10 times pre-tax, and then he said 20 times pre-tax.

THE COURT: Let's not complicate matters any more than we have already complicated them unnecessarily. I got that. If I didn't get it, you rest assured you would have heard from me earlier. Now, let's stick to our knitting again. You want to get the computation from Mr. Rohn based upon usage of a multiple?

MR. POWERS: Right.

THE COURT: Which multiple do you wish him to select?

MR. POWERS: Do it at 10 times after-tax income.

THE COURT: All right.

A May I again have the exhibits?

Q Yes, it's 11. While you're computing it, I'm also going to ask you to do it at 7 times, and then to do it at the average of 8-1/2 times. So the Court has all three computations.

A If one were to take the actual income for the year, fiscal years, 1966-1967 and 1968, the average comes out pre-tax to approximately $380,000. Assuming a 50% tax provision to cover federal and state and local taxes, you would have a $190,000 of average income, 10 times that is $1,900,000. 7 times that is $1,330,000.

Q And 8-1/2 times, so we have the average of the multiple on the record.

A $1,615,000.

Q In computing those multiples, would any special provision or add-on be given for net worth?

A No, I believe I took that into consideration in arriving at the multiple I chose.

MR. POWERS: No further questions, Mr. Rohn.

THE COURT: Mr. Cooper?

MR. COOPER: Yes, sir.

THE COURT: Going to have to close down very shortly, and I leave it up to you. Do you think you can finish in ten minutes? Or how do you feel about that?

MR. COOPER: Well, Judge, I don't think I can finish in ten minutes. I don't know if you want me to get started and go as far as I can and pick it up tomorrow morning.

THE COURT: Since you told me you can't finish, I would rather pick it up tomorrow morning. As you heard, unfortunately, I'm going to have a little trial or hearing tomorrow morning early, so it will have to be 11 o'clock. I'm sorry, Mr. Rohn, but could you be with us at 11 tomorrow?

THE WITNESS: Yes, your Honor, I can.

THE COURT: Thank you. See you tomorrow, gentlemen.

(Adjournment was taken to March 6, 1974, at 11:00 A.M.)

TITAN GROUP, INC.
vs.
HAROLD FAGGEN,
Defendant

72 Civ. 1797

Before: HON. HAROLD R. TYLER, JR., D.J.

March 6, 1974
11 o'clock, a.m.

(Case resumed.)

THE COURT: Good morning, gentlemen.

MR. POWERS: Your Honor, I have another witness here this morning who was a director at the time of this transaction, a Mr. Leonard Casey, and his testimony is very brief. Could I respectfully ask, before the cross examination of Mr. Rohn, that I be permitted to put this witness on and complete with him so he can go back to his office.

THE COURT: If it is all right with Mr. Cooper, it is all right with me.

MR. COOPER: It is all right with me, Judge.

THE COURT: All right.

MR. POWERS: Mr. Leonard Casey, please, would you take the stand?

L E O N A R D C A S E Y , called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Casey, what is your business, please?

A I'm now a vice president with Brooks Harvey and Company, Inc.

Q What business is Brooks Harvey in?

A It is a mortgage brokerageand real estate consultant.

Q How long have you been in the real estate field?

A Forty years, over forty years.

Q Were you a director of Titan Group in 1968?

A Yes.

Q Could you state for the Court when you took office in Titan and when you left, please.

A I don't recollect the exact dates, but I was a director there for approximately three years.

Q Did you hold any executive offices in the corporation besides being a director?

A No, sir.

Q While you were a director, what other business were you engaged in?

A I was then a vice president in charge of credit of the Chase Manhattan Bank, Real Estate Department.

Q And you were with the Chase Manhattan Bank throughout the period that you were a director of Titan?

A Well, I retired from Chase in 1968, November 1968. I think I was still a director at Titan for a few months subsequent to that date.

Q I take you back to the fall of 1968 and ask you when was the first time that you heard of the proposed acquisition of the Faggen Companies.

A Well, I don't recollect the correct date or the exact date, but this proposal was given to the Board of Directors by the management of Titan in and about that time.

Q Would it refresh your recollection if I suggested that it was in or about the first week of October '68?

A Well, it was in the fall, yes. I'm not sure of the date.

Q Would you like to look at the minutes of October 9th, which might refresh your recollection on the date.

Was that Board meeting of October 9th the first time that you heard any description of the proposed transaction to buy the Faggen Companies?

A That's my recollection, yes.

Q You were present at that Board meeting?

A Yes.

Q What did the management of Titan state at the Board meeting, to the best of your recollection, about the proposed Faggen acquisition?

A At the time we were looking around for additional ways in which to improve the performance of Titan. This was proposed by management as an opportunity to acquire a

business somewhat outside of our usual type of business, but was refuted to be a profitable business. And one that could possibly grow and be a worthwhile acquisition for Titan.

It was presented to us on the basis that initially, at any rate, we could acquire the company, get a yield of about ten percent on the acquisition price or somewhere in the neighborhood of 550 thousand dollars.

Q Was there pretax income that was discussed?

A As I understand it.

Q When you used the word "ten percent yield on your investment," could you explain what you mean by that further?

A Well, I think they were talking about buying this company for ten times the earnings.

Q I see. Do you recall any discussion on any aspects of the Faggen business other than the earnings, any operating aspects of the business other than the numbers?

A No, I don't.

Q I show you Exhibit 3, which is in evidence, and ask you to look through that document. Please disregard those notations.

Does any of the information contained in that Exhibit 3, Mr. Casey,-- Is that information that you had knowledge of before you read it just now?

A This was not distributed to us as directors.

Q I understand. Was any of the information contained in it stated to you orally at the meeting, if you recall?

A I believe some of it was presented by Mr. Frank at the time he suggested we acquire or consider acquiring the company.

Q Did you favor this acquisition at the meeting on October 9th?

A I preferred to stay in the real estate business, but, on the recommendation of management, I voted for the acquisition.

Q Mr. Casey, I take you back to the period in the late summer, early fall of 1968. Do you recall making an appointment with another officer of the Chase Manhattan Bank on the subject of the pension funds of the Furniture Workers Union?

A Well, I remember making such an appointment and I don't remember the union or the name of the union.

Q Can you state the substance of the matter as it occurred at that time?

A I think it was Mr. Robinson, Ben Robinson, who was Chairman of the Board, who indicated that he would like to talk with Chase about accepting an appointment to handle

their account, their pension fund account.

Q Do you recall the magnitude of those pension funds?

A No, I don't.

Q Was it in excess of fifteen million dollars?

A I don't believe it was a very large account at the time.

Q But in any event, you made the appointment.

A Yes.

Q And who was the gentleman in Chase who handled the matter with Mr. Robinson?

A I think the vice president in charge was Gene Lindberg.

Q Thank you.

MR. POWERS: I have no further questions, sir. Thank you.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Casey, you spoke to me prior to coming to court, hadn't you?

A Yes, sir.

Q As a matter of fact, I came over to see you at your office.

A You and Mr. Faggen, yes, sir.

Q We came over to see you on September 28th of last year; is that correct?

A Well, about that time. I don't recall the date.

Q Now, when was the first time that Mr. Powers came to see you?

A It is about ten days ago or two weeks ago.

Q Mr. Casey, did you know that in this case that Mr. Frankel, who is presently the Chairman of the Board of Titan, has alleged -- I'm reading from page 550 of the Appendix, your Honor -- paragraph 16 of the affidavit of Mr. Frankel, which was verified in February 1973 -- "It happens that a vice president of such bank" -- that's referring to Chase Manhattan -- "was also a director of Titan at the time along with Robinson as Chairman of the Board, thus Faggen had two good friends in court when his acquisition was under consideration at Titan in September and October 1968."

MR. POWERS: Could I ask Mr. Cooper to read the whole paragraph so the witness is not mislead by the question.

THE COURT: I have no reason to know what he is going to do, and if you feel so strongly, why don't you just be patient and let him finish and we will see what happens.

Q Mr. Casey, did you know at the time that Mr. Powers came to see you that -- or did he tell you -- that Mr. Frankel had alleged that you were a friend in court of Mr.

Faggen at the time that this acquisition was made?

A I don't recollect that, no.

Q Pardon?

A I don't recollect that, sir.

Q That Mr. Powers said any such thing to you?

A No.

Q At the time that you voted for this acquisition, would you characterize your position as that of a friend of Mr. Faggen's?

A No, I didn't know him.

Q You didn't even know him?

A No, sir.

Q Did you have anything to do --

MR. COOPER: Withdrawn.

Q Was there anything about your vote for the acquisition which had anything to do with any potential business for Chase?

A No.

Q In connection with the October 9, 1968, meeting, do you recall any discussion about any liquid assets which would come into the possession of Titan as a result of this acquisition?

A No, I don't recall that, sir.

Q You don't recall that?

A No, sir.

Q When you spoke of the proposal given by management, was that Tony Frank that you were talking about?

A Mr. Frank and Mr. Robinson -- Mr. Frank primarily, and Mr. Robinson as well.

Q Was there any discussion at all, Mr. Casey, about the earnings of the Faggen Companies, as you recall it? I mean specifically. I know you testified that - something about a yield of ten percent.

A Not specifically as I recall it, no. I think that matter was assigned to the executive committee for them to determine the profitability of it and so forth before the acquisition was made.

Q I see. Thanks very much, Mr. Casey.

MR. POWERS: I'm not going to take Mr. Casey's time up any more. Thank you very much, sir.

(Witness excused.)

MR. POWERS: Can we resume now, your Honor, with Mr. Rohn?

THE COURT: Yes.

MR. COOPER: Your Honor, before we resume with Mr. Rohn, we have subpoenaed records here for more than ten days now and I have been asking Mr. Powers for these records and I think it is important for the cross examination of Mr.

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Rohn that I have those records.

Now, as of last night, I asked Mr. Powers again for them and he said that if I would give him the subpoena he would follow it up.

Well, I don't have the records in court this morning and I think I might be prejudiced in my cross examination of Mr. Rohn without them.

THE COURT: Historically you gentlemen continue to be consistent. Both sides for years have accused each other of withholding records and it would be almost too much to expect that today we would not hear something like this.

Now, we are not going to countenance any further delays. You burdened poor Judge Ryan and the Court of Appeals with all kinds of shenanigans here and we are not going to continue that kind of play.

Now, are these records from Titan?

MR. COOPER: Yes.

MR. POWERS: Can I speak, your Honor, and tell you what I have done to get the records into court today? I met with other Titan actuarial people last night and told them they had to get together some records by subpoena. It went down to them by messenger this morning. I expect one of their accounting people to be here in court within the hour with as many records as he could find.

I didn't even bother reading Mr. Cooper's subpoena. I told my client, "Gather everything up that you can in response to it and bring it to court and I will then decide what is proper and what is improper." This is the first time that he called my attention to the details, that he wanted Titan actuarial records. They are not in Titan's possession, they are in the subsidiary's possession. The first time he called my attention to it was yesterday in court and we were here all day and I met with the relevant personnel and told them I needed some material.

THE COURT: He claims he has been after these for ten days.

MR. COOPER: Your Honor, I will produce the correspondence.

MR. POWERS: There wasn't a word exchanged between us on any of this material within the last ten days; I had no idea he wanted our records in the middle of our case. I thought if he was subpoenaing our witnesses he wanted their records when the witness came at his call.

THE COURT: What we will do is this, Mr. Cooper: We are not going to suddenly go into another delay here. I am going to ask you to either decide now to start with your cross examination of Mr. Rohn or, if you prefer, we will make arrangements to recall Mr. Rohn at a later date when you

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are ready to cross examine.

MR. POWERS: Could I make another suggestion, sir.

THE COURT: No, thank you. Would you let me finish my conversation with Mr. Cooper?

MR. COOPER: Judge, I'll tell you what I can do. I can start my cross examination and perhaps Mr. Powers says the records are coming down, and in case I cannot get the particular points that I want without those records, perhaps we can get those records by the time I get into those points, possibly.

THE COURT: In other words, what you prefer is the alternative of starting with Mr. Rohn with the hopes that maybe the records will get here.

MR. COOPER: Yes, and I would like to reserve the right, if I don't get the records, to hold him over until I do.

THE COURT: We have got to think about him, too. He is a busy man. We are not just going to hold him up on this unnecessarily for days on end without any good reason for it except the squabbles between the principals in this litigation. And I am sad to say to an extent, their lawyers.

I accept that alternative. We will have Mr. Rohn come up.

MR. POWERS: Your Honor, may I also add that Mr.

Cooper asked me last night to give him copies of the financial material that was introduced in evidence so he could prepare his cross examination today. I gave him copies and I'm sure he has a great deal of questioning on that subject, and he mentioned to me this morning he --

THE COURT: Let's not debate that further, please. Let's go ahead.

THE CLERK: Mr. Rohn, you are still under oath.

THE WITNESS: Yes, sir.

F R E D R O H N , resumed.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Rohn, you were not the accountant for Titan at the time of this acquisition, were you?

A No.

Q You had nothing to do with respect to any of the papers, analysis, investigation in connection with this acquisition until just a couple of weeks ago, I think you said, in the last two or three weeks?

A Yes, that's correct.

Q I believe you said, also, that you first had records prepared by Mr. Williams about two to three weeks ago; is that correct?

A No, I didn't generate the preparation. It was

not at my instructions. This was done by the company itself.

Q You had nothing to do with the preparation of the records by Mr. Williams?

A No, sir.

Q They were all prepared and handed to you; is that my understanding?

A That's correct.

Q Did anyone precede you in Touche Ross in assisting in the preparation of these records?

A No, sir.

Q Are you aware that Mr. Hatcher, who was the treasurer of these companies sometime between November 1970 until he left sometime in 1973--did you see an affidavit of his in this case?

A Of recent date I have seen the affidavit, yes.

Q Are you aware that he stated in his affidavit -- I'm reading from page 215A, your Honor -- "I have undertaken personally and with my staff and through accounting personnel in the Faggen Companies as well as through conferences with and inquiry by Touche Ross and Company" -- Titan's auditors -- "an intensive investigation of the earnings of the Faggen Companies since 1965 through 1968."

Were you aware, Mr. Rohn, at the time that you met with Mr. Williams that someone else from Touche Ross had

been involved in an intensive investigation of the Faggen Companies?

A No, I have not been aware of that.

Q Did you know a man by the name of Brandenberg?

A Yes.

Q Who was Brandenberg?

A Mr. Brandenberg is a partner of Touche Ross and Company in Louisville, Kentucky.

Q What was that?

A In Louisville, Kentucky.

Q Was he involved in the Faggen Company accounts?

A I don't think I can answer the question that way. He was a manager on the audit of Titan when it was headquartered in Louisville, Kentucky; to whatever extent he was involved in Faggen, a subsidiary, I don't know.

Q When did you first come to Touche Ross.

A When did I first come?

Q Yes.

A The firm of which I was a partner merged with Touche Ross on September 1, 1969.

Q What was the name of that firm?

A Puder and Puder.

Q How big a firm was that?

A We had 200 and some people.

Q At the time of the merger, were you a partner in that firm?

A Yes, sir.

Q Where were they located?

A We had offices in Newark, New York and in California. We were the largest accounting firm in New Jersey.

Q When you became a partner in Touche Ross, you testified that you had been involved in approximately seventy-five to a hundred mergers and acquisitions over the past ten years.

A That's right, yes.

Q That would take you back into the time that you were with Puder and Puder, right?

A Yes.

Q That would mean on an average of approximately one to one and a half mergers and acquisitions a month, wouldn't it?

A No. I've been a partner in a substantial accounting firm for more than eighteen years and prior to that was an empoyee for more than -- for approximately ten years.

Q I thought you said in your testimony that in the last ten years you had engaged in roughly seventy-five to a

hundred corporate acquisitions, do you remember testifying to that?

A That would be roughly so. But I may have mis-spoken. I said ten years. I would say it would be more likely to be fifteen years.

Q Well, in fifteen years -- withdrawn.

Since you didn't participate in any of the work in connection with the Faggen acquisition, you understand that your testimony here was in the capacity of an expert in accounting matters, giving opinion evidence with respect to certain accounting matters; do you understand that?

A Well, I think I was here in more than just that role, if I may. I think that there's no doubt that I am the accountant in charge of the Titan job and, therefore, have a position with respect to the client as well as an objective position with respect to the overall connotation of this transaction. I would not say that I was an independent accountant completely here.

I mean, I think I'm trying to be an objective accountant without using the word "independence" as such in the usual sense it is used in the accounting profession.

Q I didn't use the word "independent," Mr. Rohn. I don't want you to misunderstand me. I said you were

testifying here as an expert giving your opinion as to certain events and certain transactions rather than as a participant who had firsthand knowledge of those events or transactions.

A Well, that is true, yes, sir.

Q Right?

A Yes, sir.

Q So you were testifying as an expert, one, as to the accounting matters, right; and you also testified as an expert with respect to pricing of a business, isn't that so?

A Well, I think I would have to go into your question a little more in depth.

When you suggest that I was testifying as an expert in accounting matters, I feel that as a partner with some long-term experience that I can give an opinion as -- in general terms as to what the proper accounting treatment is of various items and to that extent I can give my opinion, yes.

Q That's in the field of accounting.

A Yes.

Q After that, you also testified as to your opinion regarding valuation of a business, do you recall that testimony?

A Yes, I was asked that question and I answered it.

Q With respect to valuation of a business, that is not strictly speaking within the field of accounting, is it?

A Yes, I think it is.

Q You do?

A Yes.

Q I see.

A We spend a great deal of time in those matters.

Q You have testified in court before on valuation of businesses.

A Yes, I have.

Q Have you taken securities courses in connection with that?

A Yes, I have.

Q Do you recall any specific texts that you might have referred to for the purpose of evaluating businesses?

A I don't have them in mind at this particular point. I've read lots of material on it.

Q In any case, you are aware, then, that you were testifying here as an expert in two separate categories, one as an accountant, and the other in the field of appraising or evaluating a business.

A I would not say I was appraising a business here.

Q You put a value on it, though.

A Yes. I used a businessman's judgment based upon the experience I have had as an accountant in those fields and using -- in applying a formula which is a commonly used formula, yes.

Q But you were giving your opinion, weren't you?

A Oh, yes.

Q Now, then, Mr. Rohn, since you were giving an opinion, you had to have certain information by way of an assumption on which you were working in order to render the opinion; is that so?

A Yes.

Q In making those opinions that you made, you were given certain information by Mr. Williams; I think you said that you accepted Mr. Williams' information on which you based your opinion regarding your analysis of certain testimony that you gave regarding accounting; do you recall that?

A Well, I did more than accept his information. I reviewed the schedules that had been prepared, the backup that supported those schedules, and questioned Mr. Williams at some length as to the steps that he had taken to verify them as part of his auditing procedures.

Q Did you do anything about your own personal verification of it?

A I didn't go to the records of Faggen, if that is

your question.

Q Yes.

A No, I didn't.

Q You didn't?

A No, sir.

Q So you accepted what Mr. Williams gave you?

A Yes.

Q All right.

Dealing first with the basis of -- you make a judgment that there was an accrual adjustment in 1968 of $5500; do you remember your testimony on that yesterday, Mr. --

A No, you will have to show me the exhibit and refresh my recollection.

MR. POWERS: I think it is Exhibit 10, Mr. Cooper.

MR. COOPER: Do you have a copy of it I can give to the witness?

THE COURT: Do you want Exhibit 10?

MR. POWERS: Sure.

MR. COOPER: You can keep yours.

MR. POWERS: I have another.

Q Do you know, Mr. Rohn, that that exhibit, by the way, was prepared in connection with Mr. Hatcher's affidavit,

which was sworn to on September 11, 1972. Before we get into the specific questions, did you ask Mr. Williams whether he had prepared the material that went into this or whether it had been prepared before he got into this case?

A I didn't have to ask him that. I had been furnished a copy of Mr. Hatcher's affidavit, of which this was an attachment and it obviously had been prepared by Mr. -- under Mr. Hatcher's -- during his time frame rather than Mr. Williams.

Q I thought you had testified earlier that you got your -- Mr. Williams assembled all this material for you in the last two weeks or three weeks.

A Yes, that's true. At the same time he gave me the Hatcher affidavit.

Q Let's get to this, then.

A Okay.

Q The item that you referred to of $5,500 in 1968 is an accrual item of adjustment, is it not?

A Yes.

Q You knew that Mr. Faggen had been doing business on a cash basis, did you not?

A Yes.

Q Well --

A He had been reporting for income tax purposes on

s cash basis.

Q Right. So your problem was, how do you translate from cash to an accrual basis of accounting in order to get a number for fees and retainers of $1,500 and vacation pay of $4,000; isn't that so?

A Those are the adjustments.

Q Those are the items, right?

A Yes.

Q In order to do that, you had to have some basis for accruing fees and retainers, did you not?

A Yes.

Q Did you get any material showing you how that was done?

A Yes.

Q What material did you get?

A There are backup schedules that were prepared by Mr. Sosa, who was the internal auditor, who had analyzed the records of the Faggen Companies for that period, had analyzed the particular retainer and fee bills and had put them into an appropriate year slots accounting for timing differences and accounting for years in which there was a double billing that should have been adjusted one year or another. That's what applies to the fees and retainers.

Q You would have to go back each year, wouldn't

you, back to 1966?

A That's correct.

Q '65?

A Yes.

Q And find out what the fees and retainers were at the end of the fiscal year for 1964 in order to be able to open up 1965, wouldn't you?

A Yes, that's true.

Q And you would have to go back even further to know what they were for '63 in order to open up '64, wouldn't you?

A No, we were not considering 1964. All one would have to do is look at 1964 in light of whether there should be any adjustments that affect '65. We were not trying to come up with figures that affected 1964 by itself.

Q Do you know Mr. Brandenberg's handwriting?

A I don't think I do, no.

Q I show you this memorandum and ask you if you have ever seen that memorandum from Mr. Brandenberg to Mr. Hatcher.

MR. POWERS: Can we have that marked for identification?

MR. COOPER: Yes, I will in a moment. I will show you for your purposes, Mr. --

A No, I have never seen this before.

Q You have never seen it. Are you able to read it?

A Yes, I have just started.

Q Would you read it.

A Sure.

Q To yourself, please.

Would you like to read a typed version? It might be easier.

A Yes.

MR. POWERS: Can I see the typed up version.

MR. COOPER: Yes.

Q Would you agree with Mr. Brandenberg's statements contained in that memorandum?

A I have no way to agree or disagree.

MR. COOPER: I would like to offer into evidence, your Honor, the memorandum of Mr. Brandenberg together with the typed copy of it.

MR. POWERS: I object to this, your Honor, because it is an unauthenticated document. I have never seen it before this hearing. I don't know where it came from. I never supplied it to the other side. It is being offered as something from the files of Titan from somebody who worked for Titan, and I have no knowledge of the existence of this document or whether it is authentic, when it was

written, who wrote it, for what purpose.

THE COURT: Would you do me the courtesy of letting me see it and can we have it marked for identification so the record is plain.

xx (Defendant's Exhibit K marked for identification.)

THE COURT: Mr. Rohn, did you ever see this before?

THE WITNESS: No, sir, I didn't.

THE COURT: Do you recognize the handwriting on this Xerox of the original memo?

THE WITNESS: I'm not able to comment on that, your Honor. If I said I don't recognize it, that doesn't mean that I would know that it is not his. I just --

THE COURT: I see. You can't form an opinion?

THE WITNESS: I can't form an opinion.

THE COURT: All right. Well, I am inclined to agree, Mr. Cooper, and I do not accept all the highly individualized reasoning of Mr. Powers, to be sure, but I think that since this is the state of the record now, it will not be received as Defendant's K for identification. This is without prejudice, if, as and when some witness can identify it later.

Q Do you know who Mr. Levine is?

A Mr. Levine was an employee of one of the companies but -- of the Titan Companies but I'm vague.

Q Would it help you if I told you Mr. Levine works for Titan Actuarial, he was the controller of Titan Actuarial?

A I will accept that. The name is familiar but I didn't know his exact position.

Q All right.

Now then, Mr. Rohn, would you agree that without the details of time and expense incurred with respect to fees and retainers, it would not be possible to prepare a full accrual basis financial statement on the companies acquired from Mr. Faggen for the respective fiscal years ending '65, :66, '67 and '68?

A If you don't have records, you could not come up with a full accrual basis story, no. But you can, without complete records, make certain computations which are logical and would make a large measure of the adjustments from cash to accrual appropriate and available to be made.

Q What we are talking about is items dealing with time and expense incurred by and on behalf of individual clients. Without such records, would it be possible to structure an accrual basis of fees and retainers?

MR. POWERS: Objection, been asked and answered, I think.

THE COURT: Well, if it has, it wouldn't harm to have it again. I do not think so.

A Could you read the question.

(Question read.)

A Well, when you take the word full out, I would say that it is possible to do it, yes.

Q What records did you have in front of you when you authenticated this exhibit on the fees and retainers on an accrual basis?

A There is an analysis that was made of the Faggen records by Mr. Sosa which -- in which he apparently had access to certain records that Mr. Levine apparently didn't have knowledge of or couldn't remember at the time that if he did say that an if that's an authentic document that you have been referring to --

MR. COOPER: I call for the production of that document, Mr. Sosa's records, please.

MR. POWERS: Mr. Williams, do you have any of the corporate papers with you of Mr. Sosa's?

MR. WILLIAMS: No.

Q Mr. Rohn, can you describe the particular interrogation or verification of the records that you saw.

A Yes. My interrogation was with Mr. Williams. Mr. Williams indicated to me, after I had reviewed all these

records - I asked him specific questions as to how certain adjustments were made and Mr. Williams had indicated to me that he had gone through them very carefully and had had some extensive discussions with Mr. Sosa about them and he was able to answer my questions on the specifics of the work sheets to my satisfaction.

Q So what you are saying is that the records that Mr. Williams presented you with were records which Mr. Sosa had prepared?

A The records that I looked at I understand were prepared under Mr. Hatcher's direction by Mr. Sosa, who was on the internal audit staff of Titan at the time he prepared it.

Q And he is no longer with Titan? ..

A He is not presently with Titan, no, sir.

Q So that the verification that we are talking about was actually twice removed; in other words, these are records prepared by Mr. Sosa, Mr. Williams had no part in their preparation, and then you asked him about what he inquired of Mr. Sosa; is that what you are saying?

MR. POWERS: Objection, your Honor, that's argumentative.

THE COURT: No, it is all right. Go ahead.

A I don't think that that is a fair statement of

the facts, no. Mr. Williams was in the employ of Titan during some of the period in which Mr. Sosa was also employed, and I can't tell you to the extent of which he had firsthand knowledge as to the preparation of those records.

Q Didn't you just tell us that Mr. Williams had told you that these records had been prepared by Mr. Sosa and not by him?

A Oh, he didn't have to tell me that. I recognize Mr. Sosa's writing on his work sheets.

Q So that the verification and interrogation which you were conducting was interrogation and verification with Mr. Williams who had gotten the information or the material from Mr. Sosa.

A No, he had gotten the information from the files of Titan. Mr. Sosa had prepared it. If you are asking me whether I personally had any conversation with Mr. Sosa about it, the answer is, I didn't.

Q Well, I'm talking about verification and interrogation in order to satisfy you as the independent auditor or as the accountant come here to testify as an expert as to the manner in which these various records were documented, and you are saying to us that that interrogation and verification was once removed from the person who originally prepared them; isn't that what you are saying?

A Yes, I have said that.

Q All right.

Did you make any effort to age the uncollectable accounts as of 1966?

A I didn't make any effort, no.

Q Did you check any of the records to verify how they were done?

A I didn't check the records, no, sir.

Q That's an accrual basis to determine, isn't it, go from cash to accrual? In other words, the uncollectable accounts as of 1966 in order to determine it on an accrual basis, you would have to know what the aging was for those accounts, wouldn't you?

A Well, if you are talking about uncollectable accounts, uncollectable accounts would be those which were not able to be collected and they wouldn't have any bearing on the cash statements, because if you can't collect them, it has no effect on income.

Q I believe you testified that vacation pay accrual was not booked; do you remember that?

A Yes, I believe that is true.

Q Prior to your testimony, did you have occasion to look at the contract documents in this case?

A I may have looked at them briefly. I don't

recall them in any detail.

Q Did you look at the income tax returns which were annexed to the contract documents?

A No, I didn't.

Q Did you look at the Joseph Warren stub period statements?

A Yes.

Q You saw those?

A I believe I saw those, yes.

Q Are you aware that there was an item in the Joseph Warren stub period for accrued vacation pay as at September 30, 1968, of $59,000?

A You will have to show it to me. I don't have the figure in mind.

Yes, there's an accrued vacation pay on the balance sheet of September 30, 1968, of $59,000.

Q When you stated yesterday that vacation pay accrual was not booked, it was booked, wasn't it?

A No, this is a statement. I don't know whether these -- whether this was booked or not.

Q Did you check to find out?

A I have never seen the ledger of Faggen Associates Company.

Q In order to interrogate and verify and come into

court and testify that the vacation pay accrual was not booked, you had seen a document which was a balance sheet that showed you a vacation pay accrual of $59,000?

A Well, if I may, I must go into this letter. The book -- it says here in Mr. Warren's letter that accompanies this that the books and records are maintained on a cash basis solely for the purposes of this report, adjustments have been made to reflect the balance sheet on an accrual basis. Therefore, he is clearly saying that the vacation pay is not booked and he has made an adjustment for it for the purposes of this statement. This statement doesn't tie into the books and records. He says it doesn't tie into the books and records. The books and records apparently are kept on the same basis as the tax returns have been, which is a cash basis and the vacation pay is not accrued thereon.

Q But you had a disclosure of vacation pay accrual as of that date, didn't you?

A Yes.

Q It is not an undisclosed item, is it?

A There's no doubt about it, it is disclosed, yes.

Q Are you aware, also, Mr. Rohn, that on the night of the closing, when this vacation pay item came up, there was an indemnification entered into by Mr. Faggen with Titan with respect to vacation pay?

A I wasn't aware of that.

Q You weren't aware of that?

A No.

Q Your interrogation and verification didn't go that far, right?

A No, it didn't.

Q It didn't?

A No.

Q We started out this cross examination by my asking you about certain assumptions that you made in order to be able to testify, and I think one of the assumptions that you made was that there were four types of adjustments which you treated with in order to come up with the statements that you make in Exhibit 10; do you recall that? And the four types of adjustments, I think you said, were the adding back of federal, state and city taxes, the addition of accounting service income, the deduction of investment income and the reduction in Harold Faggen's salary; do you recall that?

A Yes.

Q Those are the four items, right?

A Those are the four items of proposed pro forma adjustments that have been accounted for in this exhibit, yes.

Q And you based all of your testimony as to the

propriety of the financial information which Mr. Faggen transmitted on the basis of the assumptions that those were the only four items which adjustments could be made; isn't that so?

A No.

Q What other items were there?

A Well, I think when I evaluated this, I asked Mr. Williams and we discussed whether there were any other items that one could think of or one could have gotten as a result of reading all of the material that Mr. Sosa had prepared that would be appropriate under the circumstances. And these are the ones we felt -- that I felt that Mr. Williams and prior to him, Mr. Hatcher, had determined were appropriate and I agreed they were the appropriate adjustments.

Q Did you speak to Mr. Powers about it, about whether these were the appropriate adjustments?

A At what time?

Q Any time.

A Yes.

Q Do you know that the basis for Mr. Hatcher's investigation was that he said that he was pointed in a certain direction by counsel; do you recall that in his affidavit?

A Yes, I remember those words in his affidavit.

Q All right.

MR. POWERS: What page are you referring to, Mr. Cooper?

MR. COOPER: I will find it. The witness says he remembers it, so -- page 218A. "When the management of Titan began to investigate the underpinnings of the Faggen acquisition intensively early in 1972, we were instructed by our counsel to do for the first time a complete audit of the books of the Faggen Companies for the four years preceding the date of acquisition." Then further on, "When counsel took charge of the accounting investigation in the beginning of 1972, he stressed to me the significance of Exhibit 1 annexed to the complaint as a written representation of the earning power of the Faggen Companies for four years which new management had found in the Board of Directors' files relating to this 1968 acquisition."

Q Now then, what I'm asking you now, Mr. Rohn, is that the sequence of events was that Mr. Sosa working for Mr. Hatcher had proposed certain information in accordance with the directions of counsel investigating this and you picked it up through Mr. Williams in your analysis; isn't that so?

A Well, that's the sequence of facts, as I understand it.

Q So that you were making and you were operating under an assumption which was the same assumption that Mr. Sosa had operated on; isn't that so?

A What is that, sir?

Q An assumption of what constituted the adjustments to income.

A No, I don't think so.

Q No?

A No.

Q Well, what other adjustments to income did you assume other than the four that I mentioned before?

A You don't assume adjustments, you try to find out what appropriate adjustments would be based upon the facts as you see them.

Q Well, you weren't a party to the transaction, were you?

A I was -- no, I'm not a party to the transaction.

Q So you had to know what went into those adjustments in the first place, didn't you?

A Into what adjustments?

Q In other words, if the parties between themselves discussed what constituted the adjustments to the reported income, you would have to know that in order to know whether those adjustments were, in fact, the ones the parties made,

wouldn't you?

A Sure. That's true.

Q Well now, do you know that with respect to the salaries, for example, that there was an adjustment of the salary of Rose Dogan by contract different than the salary that she had earned prior to the acquisition by Titan?

A I have a general recollection that there was such an agreement, yes.

Q Well, do you know that her salary by contract was reduced by 10,000 -- roughly $10,000 from what it had been prior to the acquisition?

A If you show me the contract, I could refresh my recollection on the exact figures.

Q Without showing you the contract itself, I can show you a document which was annexed to the exhibits. This was -- I'm using 393A of the appendix, your Honor.

Exhibit D to the contracts lists, among others, Rose Dogan. Do you see that?

A I see the sheet of paper.

MR. COOPER: Will counsel concede that is taken from the contract documents?

MR. POWERS: Will you show me the page in Mr. Faggen's affidavit?

MR. COOPER: Page 393A.

MR. POWERS: Where does he say it is taken from the contract?

MR. COOPER: If you are saying you don't concede it, may I have the contract documents, your Honor.

MR. POWERS: Show me something that can justify it.

MR. COOPER: I'm not going to ask for a concession.

THE COURT: Here are the exhibits.

MR. COOPER: The books themselves, your Honor, the contract books.

THE COURT: Oh, you want the contract books. All right.

BY MR. COOPER:

Q Mr. Rohn --

MR. POWERS: Do you want me to concede that?

MR. COOPER: I don't want you to concede anything. Do you want to concede what is in evidence?

Q I show you the contract documents themselves, Mr. Rohn, and draw your attention to compensation, Rose Dogan, president, $40,000. Do you see that?

A Yes, I read that.

Q Do you know what her salary was before?

A I don't recall it, no.

Q Did you check to find out?

A Yes. I looked at the records at the time I checked these adjustments, but I haven't a recollection of what it was specifically.

Q As I understand it, you prepared this only by reference to another exhibit; isn't that so? In other words, the document that you drew the adjustments from was, I believe, shown to you as Exhibit 3, which was a memorandum; do you remember that?

MR. POWERS: That was Exhibit 1, Mr. Cooper.

MR. COOPER: I'm sorry, Exhibit 1.

MR. POWERS: That handwritten thing by Mr. Faggen.

MR. COOPER: I'm sorry, Exhibit 1.

Q Is that what you drew your proposed adjustments from?

A Well, this was a starting point in the thinking process, yes.

Q Right. So that on that document itself, nowhere does there appear an adjustment for Rose Dogan's salary, does there?

A Yes.

Q There does appear?

A Yes.

Q Where?

A Well, here, this handwritten schedule shows salaries, 12/31/68, can be treated as loans - Rose. I assume that is Rose Dogan.

Q That's as a loan, that's not an adjustment to the salary. Did you know what it meant when you looked at it?

MR. POWERS: Objection, your Honor, he's heckling the witness, standing over him and pointing his finger at him. The witness is answering truly and fairly. There's no need for that.

THE COURT: Mr. Powers, please, you are not the one who decides credibility in this case. Second of all, Mr. Cooper is not heckling anybody. He could not if he tried. And you have dealt with him for many more years than I have. I would thank you to keep these extreme statements out of this case. They are totally unnecessary and uncalled for.

Mr. Rohn is certainly capable of handling himself and is handling himself. And if I see any heckling, believe me, I will be a lot quicker than you are. Let's stop making these extreme statements.

Let's go forward, gentlemen, in a lawyer-like fashion without these ridiculous soto voce and even worse than that expressed on the comments which are totally fallacious from any person's point of view. I recognize the

hatred with which everybody regards one another in the case and I choose not to be a party to that, and I would ask you not to be, either.

Now, go ahead, Mr. Cooper.

BY MR. COOPER:

Q Mr. Rohn, do you have in mind my last question?

A No, I think I would like to have it repeated, if you would, please.

THE COURT: I do not blame you, Mr. Rohn.

(Question read.)

A Well, that's more than one question.

Q All right. Then let me rephrase it if you have difficulty with it.

On Exhibit 1 there's a reference to Rose and it says "treated as a loan."

A It says, "can be treated as a loan."

Q Did you inquire what that meant?

A Yes.

Q From whom?

A From Mr. Williams.

Q Well, did Mr. Williams give you the information as to where he got the information from, as to what that meant? You understand Mr. Williams was not a party to this transaction.

A Yes, I understand that.

Q So Mr. Williams told you what that meant?

A Yes, that and my reading of the various affidavits gave me an indication of exactly what this was supposed to be.

Q So you based your assumption on what Mr. Williams told you and what the affidavits told you as to what that exhibit meant, right?

A Yes, that's true.

Q Were you told by Mr. Powers that Mr. McIntyre had testified in this case in deposition?

A No, I don't recall that name.

Q Do you know who McIntyre was?

A No, I don't.

Q McIntyre was the treasurer of this company back at the time of the acquisition. And Mr. McIntyre has testified that Mr. Frank, who was the president, had asked him to look into the question of what made up the adjustments to the memorandum which he had been handed by Mr. Faggen, and I'm reading from page 7 of Mr. McIntyre's deposition.

MR. POWERS: Let me get my copy out. Go ahead, Mr. Cooper, I will find it.

Q This was a deposition taken by Mr. Powers of Mr. McIntyre at his office, meaning Mr. Powers' office, on September 26, 1973, and Mr. Powers asked Mr. McIntyre a

question.

MR. POWERS: What page?

MR. COOPER: 7.

Q "Q Did you talk to Faggen about any adjustments to earnings?

"A Yes.

"Q What did you say in discussion?

"A I asked him what made up some of the adjustments.

"Q With reference to what earnings? When you say what made up some of the adjustments, adjustments of what, what were you talking about?

"A Adjustments to the tax returns as reported in relation to the pro forma we had been looking into."

Then at page 53 Mr. Powers asked Mr. McIntyre:

"Q Were you told to check into the verasity of the $571,000 adjusted earning figure?

"A Yes.

"Q By whom?

"A Tony Frank.

"Q What did he tell you?

"A He asked me to check out, you know, what the adjustments were and see how they came up with the 571."

And then on page --

MR. POWERS: Your Honor, is there a pending

question?

MR. COOPER: Yes, there is.

THE COURT: He is trying to look for something. Mr. Powers, honestly --

MR. POWERS: Your Honor, I am not trying to harass you or my adversary.

THE COURT: He is obviously gazing through something and we all have our faults including you, and I don't know why you have to jump on this kind of thing.

MR. POWERS: I'm not jumping, sir, but I don't know what question is pending to the witness.

THE COURT: He has admitted he is in the middle of a thought. Now, for heavens sake, would you put aside your role of being our guardian and keeper on every small fault of ours? You are really not qualified for that, let alone not legally allowed to do that sort of thing. You have your faults, as do I, so does Mr. Cooper, but for heavens sake, let him ponder a moment. He was only pondering about two seconds when you jumped on your feet.

MR. COOPER: I'm looking for --

THE COURT: You look and then to accommodate Mr. Rohn and Mr. Powers and me, put your question again once you have looked.

Q Page 53:

"Q Did you get anything in writing with respect to those adjustments?

"A No.

"Q How did you check them out?

"A Talked to Harold about it.

"Q Did you do anything else other than talk to Harold?

"A Not that I remember.

"Q What reason did you have in not requesting Harold to give you anything in writing on the subject?

"A I knew what the contracts called for as far as salaries were concerned.

"Q Right.

"A So that that adjustment would be fairly easy to come up with and the funding of the pension -- there wasn't any problem about that because Harold said we were over-funded and have to pay."

MR. POWERS: Excuse me. The word is "wouldn't have to pay" with an initial from McIntyre in my original.

MR. COOPER: Right. "Wouldn't have to pay."

Q "Q You didn't look into what the funding was for prior years, did you?

"A No, I didn't.

"Q And you didn't look as to what the salaries were

for prior years, did you?

"A No. I just looked at least year's tax return.

"Q And what other reason did you not request anything in writing from Harold?

"A The taxes I can determine from the tax returns. The T and E.--

"Q You took his word for T and E?

"A There was reasonable substance to take his word on T and E."

Now, my question to you, Mr. Rohn, is this: If you knew at the time that you prepared this or went over the Exhibit 10 that among the items which adjustments had been made between the parties at the time, was an item such as pention overfunding, would that have had any bearing on your conclusions that you reached from that document?

A I did know it.

Q You did know it?

A I took that --

Q And you dismissed it?

A I didn't dismiss it. I took all the factors into play.

Q As I understand, you took the factors into play and you said that since they had paid into the pension plan in prior years, that, therefore, there was no basis for not

continuing to make payments; is that what you said?

A No, I think you have twisted it a little bit, Mr. Cooper. I think my reply -- the essence of my reply was that in any ongoing situation, operating situation, if there was a pension plan there would normally be applicable to the operations in that year an appropriate pension plan payment, as good accounting theory.

Q Did you make any attempt to find out what the assets and the liabilities were of the pension fund at the time that you made your inquiry?

A I personally didn't, no, sir.

Q Wouldn't you say that you have to know that in order to determine whether or not the pension plan was or wasn't overfunded?

A Yes, you would have to do that.

Q But you didn't go into it?

A No, I didn't go into that.

Q Then your assumption that the plan was not overfunded, because you gave no credit for it, was not based upon any investigation, was it?

A No, the assumption that I made wasn't that the plan was or wasn't overfunded. I had no knowledge of whether it was or it wasn't and still don't to this day. What I do have knowledge of is that in any normal operating situation

there is an item of pension plan payment that is a proper expenditure and a proper deduction against operating income for that period. I did know what -- that there had been payments made into that plan during the previous years 1965 through 1968. I did know that the 1967 payment was somewhat in excess, I believe, of what the 1968 payment was. I was told that, and I got the feeling, and don't ask me exactly what document I looked at to get the feeling, but I was told that the reason that there had been no adjustment made to the pension plan expense on the part of this handwritten sheet was because the pension plan was overfunded. I merely accepted, because I felt it was an appropriate reasonable assumption to make, that there had to be some expenditure for pension plan expense applicable to 1968 from strictly an operating point of view. The fact that there may have been an over-expenditure into the plan in that year or prior years and that the plan was overfunded didn't relieve one of the responsibility of saying that in an ongoing situation, if you are looking at it year by year by itself, there should be an adjustment to income for what would normally be an appropriate expenditure for pension plan payment for that year regardless of whether it was overfunded or underfunded at that time.

Q And regardless of whether the parties themselves

had bargained among the adjustments for the elimination of pension funding as an item?

A My role here was to react to whether the adjustment was reasonable and arriving at what the accrued income was for 1968. In doing so I took that into consideration, yes.

Q Mr. Rohn, you realize or do you realize that the memorandum speaks of net income adjusted to the basis which will prevail after acquisition and then goes back four years, do you know that?

A Yes.

Q Did you know that the discussions between the parties with respect to this acquisition dealt with adjustments to the net income as reported on these companies going back over those four years, that there were certain items which they had talked about that might have been eliminated or charged to the operations so that the income on a pro forma or restated basis would be adjusted; did you know that?

A Yes, you are distinguishing now proper accrual adjustments from pro forma adjustments on an ongoing basis.

Q I am not, Mr. Rohn. What I'm doing is I'm talking to you and asking you whether you knew at the time that Mr. Kaufman and Mr. Faggen discussed this acquisition and Mr. Frank discussed this acquisition, that among themselves

that they had discussed various items of adjustments, among them was the item of pension overfunding; did you know that?

A I understood that that had been discussed, yes.

Q And the reason for the adjustment of $64,000 for 1968 was that that was the amount that had been paid in in 1968 and since the pension was substantially overfunded, that kind of payment wouldn't have to have been made which would have resulted in an appropriate increase in the net income of that year?

A I don't agree with that completely, no, sir.

Q You don't know because you weren't there, do you? You are just making a calculation, aren't you?

A I am making a calculation on the accrual basis of what the appropriate accrued income was starting with the cash basis figures. And I must repeat that regardless of whether a pension plan was overfunded or underfunded, if there was a continuing pension plan, proper accrual accounting would insist that there be -- especially since the accrual income was the basis on which this particular transaction was made -- proper accrual accounting would take into account what an ordinary payment should be during that period. Whether that is $68,000 or some other figure, I can't tell you.

But I can tell you that it couldn't be zero on a

continuing basis. Forgetting the overfunding or underfunding calculation.

You are quite right that there might not be a liability for balance sheet purposes at the September 30, 1968, date. But that has nothing to do with what should be the proper charge to operations in the 1968 year.

Q Mr. Rohn, when you looked at all of these figures and looked at all of the data that had been compiled, did you determine or did you see that the net income, as reported on the returns when checked through by the auditors for Titan, check out almost dollar for dollar to the returns as to what the reported net income was; did you see that?

A Oh, the tax returns agree with the tax basis accounting on the records, yes.

Q In other words, so far as the contracts are concerned, as to what the represented net income of the contracts are, no question about that being inaccurate; is there?

A The cash basis income statements -- there are practically no -- well, I can say this: There are no material differences between the cash income as shown on the statements and what was shown on the tax returns.

Q And you know, don't you, that the contract documents represent only the income as shown on the tax

return; do you know that?

MR. POWERS: Objection, the contracts speak for themselves, your Honor.

THE COURT: I agree they do, but that is not the thrust of the question. As I understand the question, it is whether or not Mr. Rohn is aware of what they say.

MR. COOPER: Correct, your Honor.

A I'm aware that the contract figures are the cash basis figures. Yes.

Q And that was what was represented?

A Oh, I don't know what was represented.

Q I mean, did you see in the contract documents that the represented figures were the tax return figures?

A The figures in the contract documents are materially the contract figures, yes. The tax return figures.

Q Right. And there's no question that those were accurate and valid, isn't that so?

A I don't know that accurate and valid. They were in agreement.

Q All right. So now when you come in to testify as to adjusted income, you are talking about something which is not part of the contract between the parties; isn't that so?

A I don't know whether that is so, no.

Q You made assumptions on what the adjustments were in this transaction, didn't you?

A Yes.

Q And on those assumptions you testified for example that pension overfunding would have nothing to do with whether or not the pension contribution should or should not be made; isn't that what you said?

A No, I didn't say it had nothing to do with it.

Q Well, you said that for an accrual basis of accounting, that pension contribution should have been made, right?

A I don't say that pension contribution should be made, I think there has to be an adjustment to income for what an appropriate year by year cost should be in relation to the payroll and the operating income of that year. That's what I said.

Q Mr. Rohn, are you aware that in response to Touche Ross' inquiries each year, the Harold Faggen Associates and now Titan Actuarial have responded to questions by Touche Ross as to what the liabilities and the assets of the pension plan were?

A That would be an appropriate audit step we would perform, yes.

Q Are you aware that up until this year that the only contribution to the pension plan made by Harold Faggen Associates, or its successor Titan Actuarial, was made in 1971 in an amount of approximately $18,000 at a time when the number of employees of Harold Faggen Associates doubled over what they had been prior to the acquisition; are you aware of that?

A You have added -- I'm aware of part of what you said. I'm aware of the dollar figure that is in the pension plan. I'm not aware of the figures and so forth.

Q Talking about whether it is a proper charge, no charge was made in the year 1969 for pension funding, was there?

A No, there was none.

Q None was made in 1970, was there?

A No, sir. If there was it was small. I don't remember 1970.

Q 1971 there was a charge of 18,000, wasn't there?

A That's approximately right.

Q And 1972 there was no charge, was there?

A I don't recall '72 exactly.

Q Are you aware that the assets of the pension plan today is roughly $700,000 and the liabilities are roughly 250 to $300,000; are you aware of that?

A No, I wasn't aware of that.

Q Did you know what the amount of the assets of the pension plan were in 1968 as compared to the liabilities of 1968?

A No, I had no knowledge of that.

Q If I told you that there was approximately $300,000 in excessive assets over liabilities, you wouldn't quarrel with that, would you?

A I wouldn't quarrel with it at all.

Q If it was so, there would be no need to make any contribution to the pension plan, would there?

A There probably wouldn't be. I'm not an actuary, I wouldn't know. I will presume if there were no payments necessary, they would not be made. There's a distinction between the necessity of a payment and the proper setting aside of income for computation purposes on an accrual basis.

Q But after these companies were acquired by Titan, it went on and accrual basis of accounting, didn't it?

A That's correct.

Q Nothing was set aside for '69, was there?

A No, that there's a reason for.

Q Well, there was none; that's my question.

A Yes.

Q In 1970 there was not, was there?

A That's correct.

Q Mr. Rohn, I'll be finished in just a few minutes because there was some other matter I wanted to take up with you, and that was your evaluation of this business.

I believe you testified that in your judgment this business was worth anywhere between seven to ten times after tax earnings; is that right?

A That's what I testified, yes.

Q And that net worth was not part of the package.

A Net --

Q Was part of the package.

A Was part of the package, yes.

Q And that you felt that so far as the adjustments were concerned, investment income was not an appropriate adjustment; isn't that so? You took out of the income figures of the Titan Companies for Exhibit 10 purposes investment income, didn't you?

A I believe what we did was agreed with Mr. Faggen's adjustment to that, yes.

Q You took it out?

A Yes.

Q That was from Exhibit 1, right?

A Yes.

Q You don't know for a fact whether or not there

had been discussions between Mr. Faggen and others as to whether or not investment income was to be included or excluded, do you?

A I don't know anything about discussions, I was not there, no.

Q All right. So in evaluating this package among the things you did was you said we are not going to give any credit to investment income, right?

A Yes.

Q And we are not going to accrue the appreciation of the securities portfolio from the time of its acquisition or its book up until the time of acquisition, you would not do that, either, would you?

A No, I didn't make that kind of an adjustment.

Q But as a proper basis of accrual accounting you should have accrued the appreciation of the valuation of those securities from the date of purchase to the date of acquisition, shouldn't you?

A I'm not sure that is necessarily appropriate, no.

Q Do you know that Peat, Marwick, for example, did state that the value of the securities at the time of acquisition was approximately $1,300,000?

A If they did, they did.

Q Did you know that the book value was shown as

substantially less than that, do you know that?

A Yes, I do.

Q But you were not going to, for your purposes, accrue the difference in valuation in making a calculation here, did you?

A No, my reasoning was that the securities were likely to either go up or go down and one has to take some starting point as a basis and I used that -- the figures I started with as a basis, that's all.

Q You said that since net worth was part of the package and since you had already taken out investment income for purposes of determining what the income of these companies were, you were then depriving Mr. Faggen from the standpoint of evaluation on two counts: You were not giving him credit for the income derived from the investments, and you were not crediting him with the value of the securities portfolio.

A I took those matters into consideration and they are part of my overall judgment.

Q Are you saying that the net worth of these companies, if they were let's say $15,000,000, you still would not have evaluated these businesses at more than seven to ten times their after-tax earnings?

A No, that is a theoretical question. I would have to know how we got to the fifteen million and how one could

work with it. it is quite obvious, Mr. Cooper, if you are going to get $15,000,000 worth of securites, you can't pay $200,000 to acquire them.

Q Well, isn't it also obvious, Mr. Rohn, to you that if at the time of acquisition the securities portfolio alone was worth a million-three that for you to say that you evaluated that business at seven times or approximately one million-three, you were not even paying or you were just paying for what the amount of the securities portfolio was?

A That's correct. Yes.

Q You were not paying anything for the business?

A That's correct.

Q Were you aware that there was in the bank at the time, cash on hand, of over $200,000, at the time of this acquisition?

A Well, you would have to ask me in relation to the whole balance sheet.

Q But I'm talking now about what you knew about this business when you told this Court that you would not have bought this business for more than seven times its after-tax earnings, and you included in that valuation the amount of the securities, you must have included in that evaluation the amount of its cash and CD's, right?

A Absolutely.

Q Did you know that the cash and CD's on hand at that time were over $300,000?

A I'm saying to you that the value of this company in an ongoing basis, if you use the lowest parameter of my judgment, was not worth anything over and above the net book value of its assets. That's what I'm saying. That was the lowest starting point.

Q That's what you would have paid; is that what you are saying?

A I didn't say whether I would have paid it at all. Do you want me to answer what I would have done?

Q No, I'm asking you whether that was your opinion as to what you say you would have paid.

A Yes. That's what I would have valued the company at, yes.

Q In other words, you would not have even bought it, right?

A That's right.

Q You would not have even bought it -- withdrawn.

In addition to the cash in hand and the CD's, there was approximately $300,000 of excess assets over liabilities in the pension fund that could have been withdrawn immediately, couldn't they?

A I don't know that.

Q If that were so.

A I don't know that.

Q If you had checked into this company and analyzed its assets at the time that you rendered your opinion in this case, if you had checked into the pension overfunding, you would have learned the extent of the assets over liabilities, wouldn't you?

MR. POWERS: Objection, your Honor. Wouldn't it be appropriate to give the witness a balance sheet for this type of questioning? He keeps stating orally what something shows. I don't have it in front of me and neither does the witness.

THE COURT: That's quite correct, but I do not think that necessarily leads us to the sweeping conclusion you now suggest, Mr. Powers.

He is just asking him to assume certain facts, but if Mr. Rohn fails to understand that last one, I would certainly interject it. Do you understand his last question, Mr. Rohn?

THE WITNESS: Yes, I understand it.

THE COURT: Let's go back.

Q Can you answer it?

A Yes. I went by the figures that were submitted. Mr. Warren's calculations, Mr. Faggen's notes, his adjustments,

never took into account that there was a large amount of money that could be gotten back from a pension plan. It never showed up in any of the sheets I had been working with and if you tell me that I should assume that there was X amount of dollars that could be taken back that was a hidden asset, it doesn't show up anywhere; I would say to you, Mr. Cooper, that should be added onto the value of the company. Obviously.

Q My question to you, Mr. Rohn, is: that in order for you to testify as to a judgment of what the value of the business was, would it not have been appropriate for you, as a careful auditor, since you knew that there was a question in this case as to pension overfunding, to determine from the books and records of the company what was the condition of the assets and liabilities of these pension plans as of the date of acquisition?

A No, I think that I limited my judgment and limited my testimony to the information which was available to me. I have never had available to me the books and records of any of the companies, I don't know now except from the theoretical question you asked me what assets there were over and above those that had been disclosed here. To my knowledge, there has not been a return of any monies from the pension plan to the company during this period whatsoever,

and until you have just suggested it to me, I had no knowledge, firsthand knowledge, that there was any such item. And I repeat, if you tell me it is so and it is a verifiable fact that I will adjust my evaluation by including as an asset and including in the value of the company the amount of assets that had not been disclosed heretofore to any -- to - in any of the documents I have seen, to whatever extent that should be added in, I certainly would say they should be added in, yes.

Q All right. The thrust of my question, however, Mr. Rohn, is this: that in making your evaluations for testimonial purposes, you started out by saying in the beginning of my cross examination that you operated from certain assumptions, correct?

A Yes.

Q You also agree that if those assumptions w[illegible] wrong, then the conclusions which you made were likewise wrong; isn't that so?

A Yes, that's a rational answer.

Q If you were wrong as to whether or not the adjustments included a salary adjustment for Rose Dogan, then as to your testimony as to what constituted a proper reflection on the statement that you have as Exhibit 10 would also have to be adjusted accordingly; isn't that so?

A If I'm wrong, I'm wrong.

Q If you are wrong with respect to whether or not the pension overfunding was a charge which the parties themselves agreed to take into account in order to reach the restated earnings figures, then that was an agreement which had nothing to do with your analysis; isn't that so?

A I can't imagine that I'm wrong on that one. I see nothing to indicate that in arriving at what appropriate accrual income is for 1968, that that -- there has been any kind of discussion or writing to indicate that that is not a proper adjustment.

Q I just read to you, Mr. Rohn, the testimony of Mr. McIntyre. Mr. McIntyre said he had been instructed to and he did check on the question of pension overfunding. So as between the parties at that time, pension overfunding was an item on which the parties had agreed in order to restate earnings; don't you recall that?

MR. POWERS: I object to the form of that question. He's inferring an agreement from one piece of testimony he read into the record on a dollar amount for one year.

THE COURT: Well, again that may be, but what I am puzzled about is: I believe you had already asked him about this reference to what Mr. McIntyre said.

MR. COOPER: Yes, I did ask him that, Judge. I was simply asking him now in conclusion with respect to how he reached his opinion testimony based on certain assumptions, and he testified now that the assumption he was making was only from the assumption of Exhibit 1 in front of him, and he had no other assumptions on which to go on.

THE COURT: Well then, you are asking him to accept what Mr. McIntyre said as true; would that change his opinion?

MR. COOPER: Yes, your Honor.

THE COURT: Why don't you put it that way and I will allow it.

Q If what Mr. McIntyre said was true, as to an adjustment for pension overfunding, would that change your opinion any?

A Opinion as to what?

Q Opinion as to whether, in the restatement of earnings of these companies, the amount of the pension overfunding was to be calculated in reaching the restated amount.

A As far as 1968 earnings are concerned, it would not change my opinion at all, no, sir.

Q I see. And --

A Could I clarify that a little bit more?

Q Sure.

A See, I had the advantage here of looking at the subsequent years' statements and checking out whether my assumptions were appropriate or were inappropriate. In trying to be as objective as I could under the circumstances and as careful as I could, I had to take into consideration that Mr. Faggen, who was one of the participants here, was himself a CPA and was knowledgeable himself with respect to accounting matters and accounting principles.

And it always is difficult to automatically assume that certain adjustments that were or were not made by someone in that position were appropriate or not. But I felt and still feel completely comfortable with my testimony because I have had the advantage of seeing what happened over the subsequent four-year period and knowing in what has happened in the subsequent four-year period has led me to believe that the basic assumptions which were applied in arriving at this Exhibit 10 -- I believe it is 10 -- are inappropriate or not proper. And if you tell me that there are things such as an amount that can be claimed back in the way of assets, that has never been disclosed to me, sure, I will adjust my judgments accordingly. But all the other assumptions have withstood the test of time, as far as I am concerned.

Q Well, have you finished your answer?

A Yes.

Q What you are saying is with the benefit of hindsight, looking prospectively backward, you made certain assumptions, right?

A I examined those assumptions to verify the validity, yes.

Q But the real fundamental to the question of what the parties agreed on or what the parties between themselves used for the basis of those adjustments, you yourself have never spoken to any of the participants in that transaction, have you?

A No, sir, I have not.

Q You took it second and thirdhand, didn't you?

A I took it from whatever information I had, yes.

Q I show you this, which was an exhibit marked yesterday and ask you, do you recall that? I don't recall the number on that.

A Yes.

MR. POWERS: 12.

Q On Exhibit 12, it shows cash and securities transferred from October 1, 1968, through January 26, 1973. Among the items you see corporate securities at market and you have an item there for one million nineteen thousand.

A Yes.

Q Do you know that as an exhibit in this case Peat, Marwick has evaluated those securities as being worth $1,368,000?

A I think that is distinguishing in time periods. If they used a period -- a date other than what is on this, that's what the difference represents, yes.

Q Well, the date --

MR. COOPER: Your Honor, may I have, I believe it is our exhibit, J, the Peat, Marwick exhibit?

THE COURT: I do not have that Xerox. I do not seem to have that.

THE CLERK: Exhibit J.

Q Marketable securities at market on December 31, 1968. This is dated from October 1, 1968 through January 26, and as of September 31 it is one million three. On your sheet it is one million nineteen. What I'm trying to find out, Mr. Rohn, you testified that this was prepared and supervised by you; isn't that so, this Exhibit 12?

A No, this was prepared and supervised, the preparation of this, by Mr. Williams and I verified the authenticity of the cash flow figures that comprise it.

Q But how did you get to the million nineteen when the records of the corporation show a million three?

A Well, records of the corporation show what the

cost basis was. What you are showing me here is --

Q The cost basis was not one million nineteen, was it?

A No, it was lower.

MR. POWERS: Shouldn't the witness be permitted to finish his answer?

THE COURT: Believe me, Mr. Powers, if you have any doubt about that at this time, you are really just wrong. Of course he will. Anything else?

Q Did you leave out the treasury bills that were transferred, $175,000 on that sheet?

A I don't recollect the answer to that inquiry. I would have to look at the details of this. I don't recall.

Q And you treated 9,000 shares of Titan stock held by Mr. Faggen at half their value; is that right?

A No, we treated them at half of the market value as if they had been free stock.

Q In doing that, you didn't take into account what Mr. Faggen could have gotten if he sold those shares on the open market himself?

A This was an assumption -- I'm not sure they could have been sold on the open market. This was investment stock, as I understand it.

Q This was his stock that he had owned, that he

bought in the market. Did you make any investigation on that?

A Once Titan had this stock as their own security they were holding, it was investment stock as far as this computation is concerned. If you are arguing about whether it should be at 114,000 or at $57,000, which is what this is shown at, that is using an assumption that there's a fifty percent value attributable to investment stock. It is an assumption. The facts are clear as to what it is.

MR. COOPER: I have no further questions, thank you.

MR. POWERS: Mr. Cooper, before I start --

THE COURT: Just a moment, please. It is lunch time, so before you start, why don't you begin after lunch. I want to talk, if I might, to you and to Mr. Cooper in the robing room briefly before you go to lunch, if I could.

Do you want to redirect Mr. Rohn?

MR. POWERS: I only have three or four witnesses and this witness could be excused today if Mr. Cooper is through with him. I responded to his request for documents and I have them here if he wants those.

THE COURT: I rather doubt that you will do this in three or four minutes and I have something I feel is very important you should know about and your clients should be

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told over the luncheon recess. Please come with me.

(Luncheon recess)